

No. 10550

United States
Circuit Court of Appeals

For the Ninth Circuit.

THOMAS H. WINGATE, as receiver in equity for
Pacific Empire Holdings, Incorporated, a cor-
poration of the State of Delaware,
Appellant,

vs.

PETER BER CUT, HENRI BER CUT, M. MAF-
FEI and L. R. ARNOLD,
Appellee.

Transcript of Record
In Two Volumes

VOLUME I
Pages 1 to 500

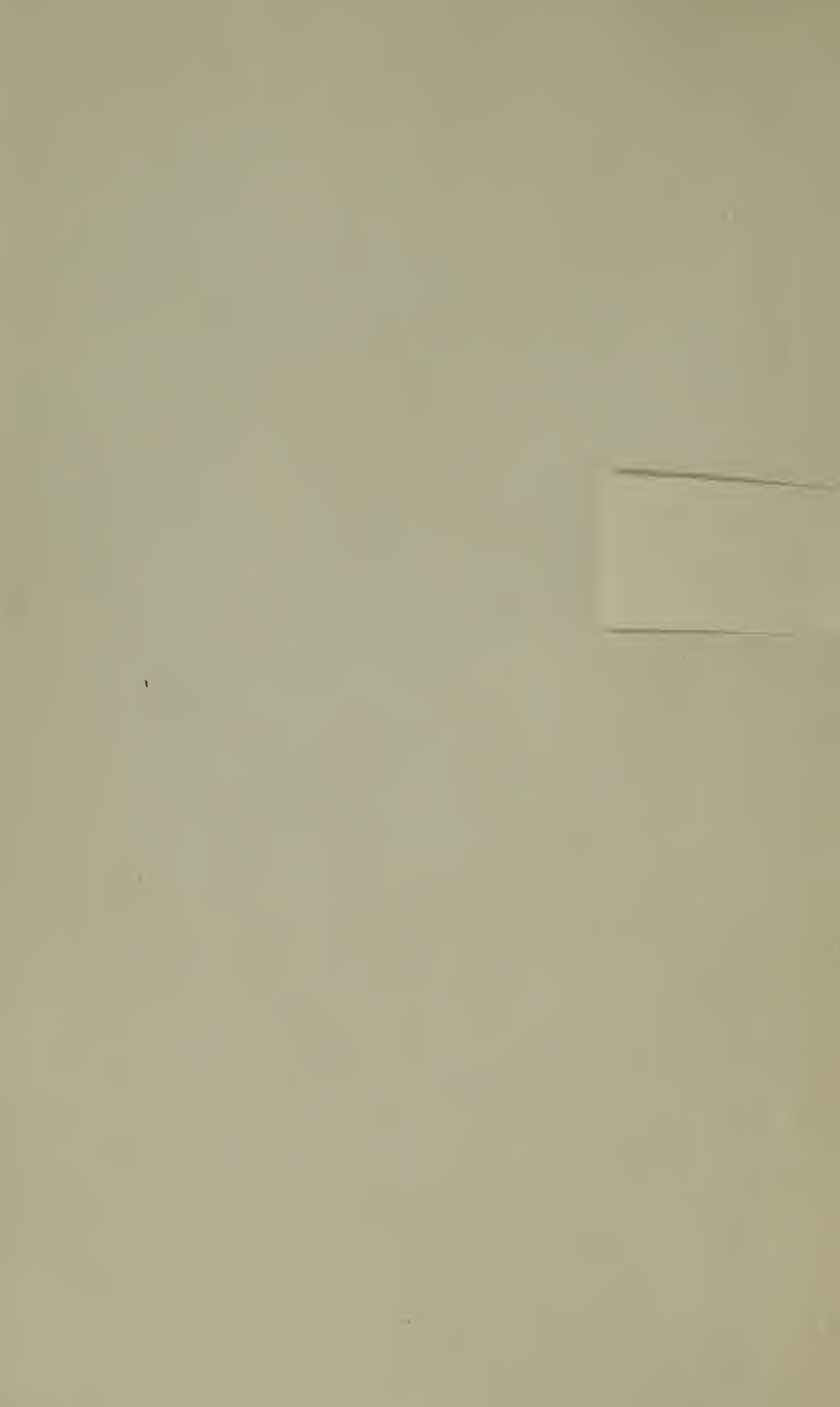
Upon Appeal from the District Court of the
United States for the Northern District
of California, Southern Division.

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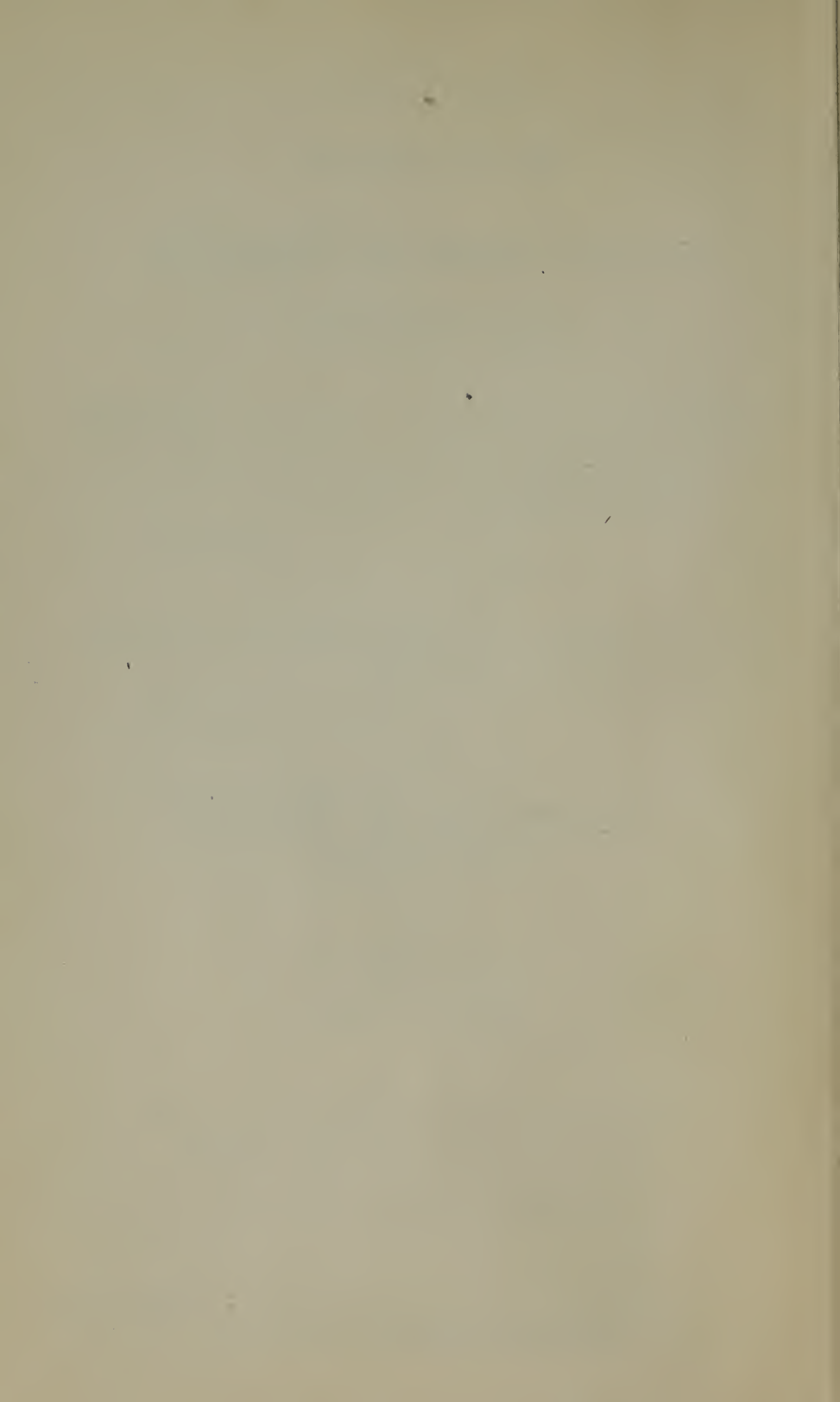
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court for the Northern District of California, Southern Division Thereof.

Civil Action File No. 22339-W

THOMAS H. WINGATE, as Receiver in Equity
for Pacific Empire Holdings, Incorporated, a
corporation of the State of Delaware,
Plaintiff,

vs.

PETER BER CUT, ERNEST E. BER CUT,
HENRI BER CUT, JEAN BER CUT, MARY
DOE BER CUT, MARY JANE BER CUT, M.
MAFFEI, L. R. ARNOLD, FIRST DOE,
SECOND DOE, THIRD DOE, BLUE AND
WHITE, a corporation, XYZ, a copartnership,
Defendants.

COMPLAINT BY A RECEIVER TO DECLARE
A TRUST, TO IMPRESS PERSONAL
PROPERTY WITH A TRUST, FOR CLAIM
AND DELIVERY OF PERSONAL PROP-
ERTY, FOR DECLARATORY JUDGMENT
AND FOR DAMAGES ARISING OUT OF
CONVERSION OF PERSONAL PROP-
ERTY.

The jurisdiction of the above entitled court over this cause is founded on diversity of citizenship and amount. Plaintiff was, at the time of the commencement of this action, and still is a citizen and resident of the State of Delaware, and is a non-

resident of the State of California. Pacific Empire Holdings, Incorporated, at all times herein mentioned was and now is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and was, at the time of the commencement of this action, and now is a resident and citizen of said state and a non-resident of the State of California. Each of the defendants named in this complaint was, at the time of the commencement of this action, and still is a citizen and resident of the State of California and resides within the jurisdiction of this Court.

The matter in controversy exceeds, exclusive of interest [1*] and costs, the sum of \$3,000, all as hereinafter pleaded.

Plaintiff complains and for a First Cause of action alleges:

1. Pacific Empire Holdings, Incorporated (hereinafter designated as Pacific Empire) is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware. Its principal office in California is at the City and County of San Francisco.

2. On the 31st day of August, 1942, in the Court of Chancery of the State of Delaware in and for New Castle County, in that certain action of Rebecca Tanzer and Elizabeth Wilhelm, complainants, vs. Pacific Empire Holdings, Incorporated, a corporation of the State of Delaware, Defendant, upon proceedings being duly had in the above court pur-

*Page numbering appearing at foot of page of original certified Transcript of Record.

suant to provisions of Section 4407 of the Revised Code of Delaware of 1935, the said Pacific Empire Holdings, Incorporated, was adjudged and decreed to be insolvent in the equity sense, and Thomas H. Wingate, the plaintiff herein, of the City of Wilmington, State of Delaware, was appointed Receiver of Pacific Empire Holdings, Incorporated, with full power to take charge of the estate, effects, business and affairs thereof, to collect the outstanding debts due and belonging to the said Pacific Empire Holdings, Incorporated, and with power to prosecute and defend in the name of said Pacific Empire Holdings, Incorporated, or otherwise, all claims and suits. Said Thomas H. Wingate has qualified as such receiver of and for Pacific Empire Holdings, Incorporated, and he is now the duly appointed, qualified and acting receiver in equity for said corporation. A copy of said order of appointment is attached hereto, marked exhibit A. and incorporated herein by reference.

3. Under and pursuant to Section 4408 of the Revised Code of Delaware of 1935, now in full force and effect, said Thomas H. Wingate, as such receiver, has been and now is vested with the title of said Pacific Empire Holdings, Incorporated, a corporation, to all its books, papers and documents, interests in patents, patent rights, copyrights, and trade-marks, rights of action arising upon contract or from the unlawful taking or detention of or injury to property of such corporation, and other property, real, personal or mixed of whatever nature,

kind, class or description, and wheresoever situate, except real estate situate outside of the State of Delaware. Said receiver files this [2] action, as such receiver, and for the benefit and protection of said Pacific Empire Holdings, Incorporated, its stockholders and creditors, many of whom are located in the State of California.

4. Pacific Empire was originally incorporated under the laws of the State of Delaware with the name of Associated Calitalo Holdings, Ltd. Inc., on the 17th day of May, 1934, by amendment to its certificate of incorporation duly made in accordance with the law, its corporate name was changed to Pacific Empire Holdings, Incorporated. As of this day Pacific Empire Holdings, Incorporated, has outstanding 2,500,000 shares of common stock of a par value of ten cents (10¢) a share owned by approximately 10,000 stockholders. It has aggregate liabilities in excess of \$250,000. Its principal activities have at all times been conducted in California within the jurisdiction of this court.

5. Continuously since approximately the year 1931, up to and including August 20, 1942, defendants M. Maffei, Peter Bercut and L. R. Arnold were, and each of them was a director and member of the executive committee of Pacific Empire and said defendants were, respectively, the President, Vice-President and Vice-President-Secretary of said corporation. During all of said period of time, defendants M. Maffei, Peter Bercut and L. R. Arnold, and each of them, actively participated in the man-

agement of Pacific Empire and they were, and each of them was familiar with all matters and things appertaining to the condition and affairs of the corporation, especially with its financial condition and the nature of the properties it owned.

6. In 1931, or thereabouts, Pacific Empire acquired for the sum of approximately \$400,000, ownership of the majority of the outstanding stock of the Merchants Ice & Cold Storage Company, a California corporation, which latter corporation owned and operated an ice and cold storage business with its principal place of business at San Francisco, California. At various times thereafter and until December 31, 1940, Pacific Empire acquired ownership' of additional shares of stock of the Merchants Ice & Cold Storage Company. Between 1931 and December 31, 1940, in order to obtain funds to lend to Merchants Ice & Cold Storage Company to enable it to meet its obligations, to obtain funds with which to purchase the additional stock interest in Merchants Ice & Cold [3] Storage Company above referred to, and in order to meet its own obligations and operating expenses, Pacific Empire disposed other holdings and properties and at December 31, 1940, the only substantial assets of Pacific Empire were the following:

78,358 shares of capital stock of Merchants Ice & Cold Storage Company, consisting of 12,493 shares of preferred stock and 65,863 shares of common stock. The reasonable value of said shares at said time was \$1,000,000.

47½% or thereabouts of the outstanding capital stock of California Pacific Service Corporation, a California corporation, operating a laundry at Bakersfield, California. The reasonable value of said shares at said time was approximately \$25,000.00.

52% of the outstanding capital stock of Pacific Empire Corporation, a California corporation. The reasonable value of said shares at said time was approximately \$75,000.00.

At said time Pacific Empire had pledged to Pacific Empire Corporation, a California corporation, 3,990 shares of preferred and 49,944¼ shares of common of the total of 78,358 shares of stock of Merchants Ice & Cold Storage Company aforementioned as security for notes and accounts payable to Pacific Empire Corporation in the amount of \$136,855.34, or thereabouts. All of the other aforementioned assets of Pacific Empire were in pledge at said time to secure other obligations of Pacific Empire and in addition thereto, Pacific Empire owed other unsecured obligations of approximately \$100,000. The foregoing obligations were all due and payable and the only assets available for payment thereof were the assets specifically enumerated in this paragraph (6) hereof.

7. The Pacific Empire at said time, to wit, on or about December 31, 1940, had a board of directors consisting of seven directors. The said directors at said time were the following:

M. Maffei, A. A. Heer, L. R. Arnold, Luigi Giachino, Webb Richards, Peter Bercut, T. M. Ryerson.

At said time the said Pacific Empire had an executive committee consisting of three directors. At said time the said executive committee consisted of M. Maffei, L. R. Arnold and Peter Bercut. [4]

8. At said time, to wit, on or about December 31, 1940, the By-Laws of Pacific Empire then in full force and effect provided as follows:

Article IX of said By-Laws, dealing with the office of President, states:

“Section 1. Nature of Office. The President shall be the chief executive officer and head of the corporation and shall have general control and management of its business and affairs subject to the control of the board of directors.”

Article X of said By-Laws, dealing with the office of Vice-President, states:

“The Vice-President in the absence or inability to act of the President is vested with all the powers and shall perform all the duties of the President. If there be more than one vice-president, they shall be numbered and each shall act in the absence or inability to act of the president and of all vice-presidents preceding him in number. In such acts and in the execution of writings by such vice presidents, it shall not be necessary to recite the absence or inability of any preceding officer to act.”

Article XI of said By-Laws, dealing with the office of Secretary, states:

“Section 1. Nature of Office. The secretary *shall ex-officio*, secretary and clerk of the board of directors and secretary of all stockholders’ meetings and of the executive and of all other committees. He shall attend to all their sessions and shall record all votes and minutes of their proceedings in a book or books kept for that purpose.

“Section 2. Notes. He shall give or serve all notices required by law or the order of the president and all notices required of all meetings of the stockholders, directors and committees when not otherwise legally given. In case of his absence, inability, refusal or neglect so to do, then such notices may be given or served by any person thereunto directed by the president.

“Section 3. Certificate of Stock. He shall keep a book of blank certificates of stock, and shall fill out and countersign all certificates of stock issued, and make entries evidencing such issuance on the margin of said book.

“Section 4. Corporate Seal. He shall keep the corporate seal and he shall affix said seal to all papers requiring the affixation thereof, including certificates of stock.

“Section 5. Transfer Book. He shall keep a transfer book and a stock ledger in debit and credit form showing the number of shares

issued to and transferred by any stockholder and the dates of such issuance and transfer. [5]

“Section 6. Account Books. He shall keep proper account books, in debit and credit form, of all moneys received by or paid out by the corporation. He shall as often as required by the president make and file in the office of the company a trial balance sheet and shall as often as required make and file in the office of the company a balance sheet showing profits and losses of the company as appear by its books.

“Section 7. General Duties. He shall in general perform all other duties required by the president, directors or committees.

Article VI of said By-Laws, dealing with the duties of directors, sub-section 6 thereof, states:

“Management. The board of directors shall manage and control the business of the corporation.”

Article VII of said By-Laws, dealing with the duties of the executive committee, states:

“Section 1. Appointment. The directors may appoint an executive committee from their own number to consist of such number as they shall see fit.

Section 2. Powers. Any executive committee appointed by the board of directors shall have authority to exercise all the powers of the board of directors when said board is not in session, but subject to the immediate disaffirmance by

the board at its next meeting after receiving the report of the acts done by said committee. Such committee may act by the written consent of all its members although not formally convened.

Section 3. Removal. Members of this committee may be removed as such and their successors may be appointed by the board and said committee may be abolished at any time by the board of directors."

9. On Information and Belief.

On or about December 31, 1940, the defendant Peter Bercut, then and there a director, vice president and a member of the executive committee of Pacific Empire, and the defendant, M. Maffei, then and there the president, a director and a member of the executive committee of said corporation, and the defendant L. R. Arnold, then and there a vice president, the secretary, a director and member of the executive committee of said corporation, and each and all of the remaining defendants designated herein, then and there well knowing that said Pacific Empire was indebted to said creditors in said sums, and then and there well knowing that Pacific Empire was unable to pay its said obligations other than by a disposal or liquidation of the assets hereinbefore in [6] paragraph 6 hereof described, at said time, entered into a conspiracy with each other to acquire for themselves, for a nominal consideration, the said 78,358 shares of the capital stock of Merchants Ice & Cold Storage Company

then and there owned by Pacific Empire, through the use of the position, power, influence and office of the said M. Maffei, L. R. Arnold and Peter Bercut in said Pacific Empire.

10. On Information and Belief:

At said time, to wit, December 31, 1940, the said 78,358 shares of the capital stock of Merchants Ice & Cold Storage Company were and they are now reasonably worth the sum of \$1,000.00.

11. On Information and Belief:

In pursuance of said conspiracy, the defendants, M. Maffei, then and there purporting to act as President, and defendant, L. R. Arnold, then and there purporting to act as Secretary of Pacific Empire and defendant, Peter Bercut, then and there purporting to act in his individual capacity and not as an officer or director of Pacific Empire, did then and there purport to execute and enter into an agreement, a copy of which agreement is attached to this complaint, marked Exhibit B, and hereby specifically made a part hereof by reference.

12. On Information and Belief:

Pursuant to said purported agreement the defendant Peter Bercut, then and there purporting to act for himself, in his individual capacity, but in truth and in fact acting for and on behalf of himself and all the other defendants herein, did, on or about January 8, 1941, take possession of the said 78,358 shares of the capital stock of Merchants Ice & Cold Storage Company then and there the property of Pacific Empire, and of which 53,934 $\frac{1}{4}$ shares were

then and there pledged to Pacific Empire Corporation, and did then and there, in accordance with the requirements of said purported agreement, pay to Pacific Empire, the sum of \$35,000 in cash, out of which sum \$25,000 was then and there paid over to Merchants Ice & Cold Storage Company by Pacific Empire. At no time was there ever held any meeting of the board of directors or of the executive committee of Pacific Empire for the purpose of acting upon, [7] ratifying or approving the said purported sale by the corporation to Peter Bercut of the said shares or any portion thereof and at no time, either prior to or after said transaction, was there ever submitted to the stockholders of Pacific Empire for their approval or consideration any sale by the corporation of the said or any part of said stock of Merchants Ice & Cold Storage Company to Peter Bercut or to anyone else.

At the time of the execution of the agreement, a copy of which is attached hereto as Exhibit B, and at the time of the delivery of the shares of stock of Merchants Ice & Cold Storage Company as herein alleged, defendants, and each of them, knew of the existence of the prior pledge of 53,934 $\frac{1}{4}$ of said shares to Pacific Empire Corporation as hereinbefore alleged, said defendants, and each of them, further knew that said pledge had never been released and was in full force and effect; defendants, and each of them, further knew that said pledged stock had been delivered to Pacific Empire Corporation by Pacific Empire and had been delivered to Pa-

cific National Bank of San Francisco by Pacific Empire Corporation; defendants, and each of them, further knew that their contemplated transaction would render Pacific Empire insolvent and its note to Pacific Empire Corporation valueless, whereby Pacific Empire Corporation would also be made insolvent and the stock thereof valueless. With knowledge of each and all of the foregoing facts, defendants obtained possession of the pledged shares and delivered them in furtherance of their conspiracy as hereinabove alleged, without the knowledge or consent of the pledgee, express or implied.

13. On Information and Belief:

The said 78,358 shares of the capital stock of Merchants Ice & Cold Storage Company taken in the manner aforesaid by said Peter Bercut are now held jointly by and between himself and the other defendants in proportion unknown to plaintiff. Said defendants claim and assert to be the owners of said shares, and by reason and as a result thereof the defendants have caused to be elected a new board of directors of Merchants Ice & Cold Storage Company and they and each of them, as the result of said transaction have denied to Pacific Empire any right or estate in said shares of Merchants Ice & Cold [8] Storage Company, or any voice in the management of said Merchants Ice & Cold Storage Company.

14. By reason of said transaction Pacific Empire was rendered insolvent and unable to meet its debts or other obligations and its creditors and stockhold-

ers were defrauded to the extent of the excess value of the shares of Merchants Ice & Cold Storage Company over the consideration paid, namely, \$965,000. Upon the appointment of Thomas H. Wingate as receiver for Pacific Empire, the said transaction was forthwith repudiated by him and written notice of said repudiation was immediately given to said Peter Bercut.

15. Plaintiff has made demand upon the defendants for the return of said shares of stock to plaintiff, but the defendants have refused to do so and plaintiff is informed, believes and alleges that said defendants, and each of them, will, unless restrained by this court, dispose of, alienate and secrete the said shares of stock, to the irreparable injury and damage of the creditors and stockholders of Pacific Empire.

16. Plaintiff hereby tenders to the defendants the consideration paid to Pacific Empire pursuant to said Letter Agreement dated January 8, 1941, purported to have been entered into between Pacific Empire and the defendant Peter Bercut as hereinbefore stated.

17. The names of the defendants sued herein as Mary Doe Bercut, Mary Jane Bercut, First Doe, Second Doe, Third Doe, Blue and White, a corporation, ZYX, a corpartnership, are fictitious, and plaintiff prays that when said true names shall have been ascertained said true names of said defendants may be inserted herein and in all proceedings hereafter in lieu thereof. [9]

As and by way of a Second Cause of action against the defendants and each of them, plaintiff alleges:

1. Plaintiff refers to and incorporates herein at length all of the allegations stated in paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 17 of the first cause of action of this Complaint.

2. On or about January 8, 1941, Pacific Empire was the owner of 78,358 shares of the capital stock of Merchants Ice & Cold Storage Company, a California corporation, consisting of 12,495 shares of preferred stock and 65,863 shares of common stock evidenced by the following certificates of stock, to wit, those certain certificates of stock particularly described in Exhibit "C" hereto attached.

3. The value of said 78,358 shares of stock of Merchants Ice & Cold Storage Company at said time was and now is \$1,000,000.

4. The said defendants and each of them on or about the 8th day of January, 1941, in the City and County of San Francisco, State of California, without plaintiff's consent or the consent of Pacific Empire, wrongfully, came into the possession of said 78,358 shares of stock of Merchants Ice & Cold Storage Company evidenced by the said certificates of stock particularly described in Exhibit "C" hereto attached, and still retain the possession of the same and the defendants and each of them now claim and assert to be the owners thereof.

5. Before the commencement of this action, to wit, on or about the 28th day of September, 1942,

plaintiff demanded of the defendants the return and possession of said shares of stock and personal property to plaintiff, but the defendants and each of them refuse to deliver the said shares or personal property to plaintiff and continue to unlawfully withhold the same from the possession of plaintiff to his damage in the sum of \$1,000,000.

6. The said personal property and shares of stock of Merchants Ice & Cold Storage Company have not been taken for a tax assessment or fine pursuant to a statute or seized under an execution or an attachment against the property of plaintiff.

[10]

As and by way of a Third Cause of action against the defendants and each of them, plaintiff alleges:

1. Plaintiff refers to and incorporates herein at length all of the allegations stated in paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 17 of the first cause of action of this Complaint.

2. On or about January 8, 1941, plaintiff was the owner of 78,358 shares of stock of Merchants Ice & Cold Storage Company consisting of those certain certificates of stock particularly described in Exhibit "C" hereto attached.

3. The value of said 78,358 shares of stock of Merchants Ice & Cold Storage Company at said time was and now is \$1,000,000.

4. On or about January 8, 1941, the defendants and each of them converted to their own use and benefit the said 78,358 shares of the capital stock of Merchants Ice & Cold Storage Company evi-

denced by the certificates of stock particularly described in Exhibit "C" hereto attached to plaintiff's damage in the sum of \$1,000,000.

5. On or about January 8, 1941, the defendants and each of them became indebted to plaintiff and now owe to plaintiff the sum of \$1,000,000, being the reasonable value of 78,358 shares of the capital stock of Merchants Ice & Cold Storage Company, consisting of 65,863 shares of common stock and 12,495 shares of preferred stock then and there owned by plaintiff and then and there converted by the defendants and each of them to their own use and benefit.

Wherefore, plaintiff prays for judgment as follows:

1. That plaintiff be declared the owner and entitled to the possession of said 78,358 shares of stock of Merchants Ice & Cold Storage Company.

2. That the agreement dated January 8, 1941, purported to have been entered into between Pacific Empire and the defendant Peter Bercut be declared not to be the corporate act of or binding upon Pacific Empire or plaintiff herein.

3. That the defendants and each of them be adjudged to be the holders of all shares of stock of Merchants Ice & Cold Storage Company received by them and each of them through the defendant Peter Bercut, as the result of the [11] transaction herein complained of, in trust for the benefit of plaintiff; that they and each of them be ordered to deliver all of the said shares to plaintiff under such terms and

conditions as to the court may seem fair and equitable in the premises; that if delivery cannot be made, for any reason whatever, the defendants be ordered to pay to plaintiff the sum of \$1,000,000, being the value of said shares.

4. That the defendants and each of them be ordered to account for and pay over to plaintiff any profits or sums secured by them as the proximate result of the transaction herein complained of.

5. That the defendants and each of them, their agents, servants, employees and attorneys be restrained by the Court from alienating, hypothecating or transferring or parting with possession of any of said shares of stock and that they be ordered to pay to plaintiff the reasonable value of any of such shares as they may be no longer legally able to restore to plaintiff.

6. Such other, further and additional judgment, order or relief as may, to the court, be deemed just and reasonable in the premises, including costs of suit incurred herein.

7. For judgment against the defendants and each of them in the sum of One Million Dollars (\$1,000,000).

A. J. SCAMPINI

L. F. MAHAN

ELLIS & STEINDORF

CONRAD T. HUBNER

Attorneys for Plaintiff.

Of Counsel for Plaintiff

IVAN CULBERTSON [12]

EXHIBIT "A"

In the Court of Chancery of the State of Delaware
in and for New Castle County

REBECCA TANZER and
ELIZABETH WILHELM,

Complainants,

vs.

PACIFIC EMPIRE HOLDINGS, INCORPORATED,
a corporation of the State of Delaware,
Defendant.

BILL FOR RECEIVER

And now, to-wit, this 31st day of August, A. D. 1942, the Bill of Complaint in the above entitled cause, with the Answer of the defendant admitting the allegations of said Bill and consenting to the granting of the relief prayed for, being duly presented, and it appearing therefrom that the defendant is a corporation organized and existing under the laws of the State of Delaware, that complainant is a creditor and stockholder thereof, that the defendant is insolvent in the equity sense, in that it is unable to pay its obligations as they mature in due course of business, that defendant is not a corporation for public improvement, and that the appointment of a Receiver or Receivers of said defendant by this Court would be for the benefit of its creditors and stockholders.

It is ordered, adjudged and decreed by the Chancellor that Thomas H. Wingate of the City of

Wilmington, State of Delaware, be and he is hereby appointed Receiver of Pacific Empire Holdings, Incorporated, the defendant herein, to take charge of the estate, effects, business and affairs thereof, [13] to collect the outstanding debts, claims and property due and belonging to the said defendant, with power to prosecute and defend in the name of said defendant, or otherwise, all claims and suits; to appoint an agent or agents under said Receiver, and, subject to the approval of the Chancellor, to do all other acts which might be done by said corporation that may be necessary and proper; and with power to compromise, adjust, and settle claims which the defendant has against any person, firm, or corporation, or which may be due to the defendant by any person, firm, or corporation;

And it is further ordered that said defendant, its President, directors, officers, agents, servants and attorneys be and they are each of them hereby restrained and expressly enjoined, until further order of the Chancellor, from receiving, collecting or compromising any debts due or belonging to defendant and from paying out, selling, assigning or transferring any property, estate, moneys, funds, lands, tenements or effects of any description whatsoever belonging to said defendant to any person other than the Receiver hereby appointed;

And it is further ordered that said defendant, its President, directors, officers, agents, servants and attorneys, shall forthwith deliver to said Receiver the property and effects thereof and all books, rec-

ords and papers touching the same and pertaining to its business and affairs in its or their possession or custody;

And it is further ordered that, pursuant to paragraph 4707, Section 41, of the Revised Code of the State of Delaware of 1935, said Receiver shall be and hereby is vested by operation [14] of law, without any act or deed, with the title of said defendant to all its books, papers and documents, interests in patents, patent rights, copyrights and trademarks, rights of action arising upon contracts or from the unlawful taking or detention of or injury to property of said defendant; and other property real, *person* or mixed, of whatsoever nature, kind, class or description, and wheresoever situate, except real estate situate outside of the State of Delaware;

And it is further ordered that said Receiver, within five days from this date, shall give bond in the usual form in the sum of Two Thousand Dollars (\$2,000) with surety approved by the Chancellor, conditioned for the faithful performance of his duties as such receiver, and National Surety Company, a corporation of the State of New York, is hereby approved as surety on said bond;

And it is further ordered that the Chancellor reserves the right to make such further order or orders, decree or decrees herein as to him shall seem proper.

(signed) WM. WATSON HARRINGTON
Chancellor [15]

In the Court of Chancery of the State of Delaware
in and for New Castle County

State of Delaware,
New Castle County—ss.

I, Anthony F. Emory, Register of the Court of Chancery of the State of Delaware, in and for New Castle County, do hereby certify that the foregoing is a true and correct copy of order signed by Chancellor August 31, A. D. 1942, appointing Thomas H. Wingate receiver of Pacific Empire Holdings Incorporated etc. as the same remains on file and of record of said court; in the receivership cause of Pacific Empire Holdings, Incorporated, etc.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of said Court at Wilmington, this 4th day of September, 1942.

ANTHONY F. EMORY

Register in Chancery [16]

EXHIBIT "B"

January 8, 1941

Mr. Peter Bercut
739 Market Street
San Francisco, Cal.

Dear Mr. Bercut:

The following will confirm our understanding and agreement relating to the sale to you by this corporation, Pacific Empire Holdings, Inc., of the con-

trolling shares of stock of Merchants Ice and Cold Storage Company, now owned by this corporation.

The purchase price, as agreed to be paid by Peter Bercut, is \$35,000.00, for which it is agreed that Peter Bercut is to receive, in accordance with the following conditions, the total of 78,358 shares of stock of Merchants Ice and Cold Storage Company, consisting of 12,495 shares of Preferred stock and 65,863 shares of Common stock.

It is agreed by this corporation that out of the proceeds of this sale, to-wit, \$35,000.00, the sum of \$25,000.00 will be paid by this corporation to Merchants Ice and Cold Storage Company. Out of the balance remaining, the sum of \$6,000.00 is to be remitted to Pacific National Bank, in order to secure the release from them of all stock of Merchants Ice and Cold Storage Company now on pledge as security for the obligations of the corporation to Pacific National Bank.

It is further understood and agreed that 5,516 $\frac{2}{3}$ shares of Preferred stock of Merchants Ice and Cold Storage Company, now held by California Baking Company as security for the balance owing by the corporation of \$4,100.00 is to be delivered to Peter Bercut when this obligation is paid.

It is understood and agreed by Peter Bercut that the corporation shall have the option to purchase, at 50¢ per share, all or any part of 20,000 shares of Common stock of Merchants Ice and Cold Storage Company within two years from date hereof. It is

understood that the corporation may obtain delivery of any portion of the 20,000 shares as paid for, from time to time, within the said two year period. It is further understood and agreed, in this connection, that all of the voting rights on the said 20,000 shares herein referred to shall remain with Peter Bercut for a period of seven years from date hereof, whether or not the said 20,000 shares are purchased by the corporation. All rights and privileges of Pacific Empire Holdings, Inc., in connection with the 20,000 shares of Common stock, hereinabove referred to are not assignable.

Yours very truly,

PACIFIC EMPIRE HOLDINGS,
INCORPORATED

By M. MAFFEI, Pres.

By L. R. ARNOLD, Secy.

Agreed and Accepted:

PETER BER CUT [17]

EXHIBIT "C"

SHARES OF MERCHANTS ICE & COLD STORAGE COMPANY OWNED BY
PACIFIC EMPIRE HOLDINGS, - INCORPORATED, AND DELIVERED TO
PETER BERCUT.

Cert. No.	No. Shares	Description	
55	550	Merchants Ice & Cold Storage Co.	preferred
64	30	"	"
161	210	"	common
39	3,990	"	preferred
144	49,944 $\frac{1}{3}$	"	common
164	11,434	"	common
73	900	"	preferred
165	326 $\frac{2}{3}$	"	common
7	2,500	"	preferred
9	1,000	"	"
43	1,566 $\frac{2}{3}$	"	"
46	450	"	"
52	500	"	"
P77	10 (\$100 par)	"	(Wm. H. Roussel)
P250	20	"	(Marian Kershaw)
P511	10	"	(Marian Kershaw)
P512	10	"	(Mrs. W. H. Roussel)
P626	10	"	(Marian Kershaw)
P627	10	"	(Wm. H. Roussel)

In addition to the foregoing specific certificates, other certificates evidencing additional shares of Common and Preferred shares of Merchants Ice and Cold Storage were delivered to Peter Bercut. The numbers of these certificates and the number and class of shares evidenced by them are presently unknown to plaintiff but are known to the defendants.

[Endorsed]: Filed Oct. 20, 1942. [18]

[Title of District Court and Cause.]

ANSWER

Now come the defendants Peter Bercut, Ernest E. Bercut, Henri Bercut and Jean Bercut, and answering the complaint on file herein, admit, deny and allege as follows:

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations on page 1 of said complaint that plaintiff was at the time of the commencement of this action and still is a citizen and resident of the State of Delaware and a non-resident of the State of California, and deny said allegation upon said ground.

1. Answering the first cause of action set forth in said complaint, defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 2 and 3 thereof and basing their denial upon that ground, deny generally and specifically, each and

[19] every, all and singular the allegations therein contained.

2. Answering the allegations contained in paragraph 4 thereof, defendants are without knowledge or information sufficient to form a belief as to the truth of the averments that Pacific Empire Holdings, Inc. has 2,500,000 shares of common stock of a par value of 10¢ per share owned by approximately 10,000 shareholders, issued and outstanding, and that it has aggregate liabilities in excess of \$250,000.00, and basing their denial upon said ground, deny generally and specifically, each and every, all and singular the said allegations.

3. Answering the allegations contained in paragraph 5 thereof, these answering defendants admit that continuously since approximately the year 1931 up to and including August 20, 1942, the defendants M. Maffei and L. R. Arnold were, and each of them was a, director and member of the Executive Committee of Pacific Empire Holdings, Inc., a corporation, and that M. Maffei was president and L. R. Arnold was vice president and secretary of said corporation. These answering defendants deny that Peter Bercut since approximately 1931 up to and including August 20, 1942 was a director and member of the Executive committee and vice president of said corporation and in this behalf allege that on or about February 15, 1933, said Peter Bercut was elected and became a director of said corporation and that on or about February 19, 1935, defendant Peter Bercut became and was a member of the

Executive Committee of said corporation, and on or about March 28, 1933 was elected a vice president of said corporation. Defendants further admit that said Peter Bercut remained as a director, vice president and member of the Executive Committee of said corporation until on or about March 30, 1940. Defendants deny that during all of said period of time, M. Maffei, L. R. Arnold and Peter Bercut and each of them actively participated in the management of Pacific Empire Holdings, Inc., and that they and each of them were familiar with all matters and things appertaining to the condition and affairs of the corporation and especially with its financial condition and the nature of the properties it owned. In this regard, these answering defendants allege that during all of said period of time, the affairs of said corporation were actively managed, controlled and directed by M. Maffei and L. R. Arnold and that Peter Bercut took no active part in the management or direction of the [20] affairs of said corporation and/or the preparation of any financial statements in connection therewith or appertaining thereto.

4. a. Answering the allegations of paragraph 6 thereof, these answering defendants deny that in 1931, or thereabouts, Pacific Empire Holdings, Inc. acquired for approximately the sum of \$400,000.00 ownership of a majority of the outstanding stock of Merchants Ice & Cold Storage Company, a California corporation.

b. Defendants admit that at various times subsequent to 1931 to and including March 15, 1940, said corporation acquired ownership of shares of common and preferred stock of Merchants Ice & Cold Storage Company at prices varying upwards from $12\frac{1}{2}\text{¢}$ per share for common stock and \$1.00 per share for preferred shares and defendants allege that the total cost to Pacific Empire Holdings, Inc. for all of said shares so acquired did not exceed the sum of \$250,000.00.

c. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations that between 1931 and December 31, 1940, in order to obtain funds to lend to Merchants Ice & Cold Storage Company to enable it to meet its obligations, to obtain funds with which to purchase additional stock in said Merchants Ice & Cold Storage Company, and in order to meet its own obligations and operating expenses, Pacific Empire Holdings, Inc. disposed of its holdings and property, and at December 31, 1940, the only substantial assets of Pacific Empire Holdings, Inc. were the following:

78,358 shares of capital stock of Merchants Ice & Cold Storage Company, consisting of 12,493 shares of preferred stock and 65,863 shares of common stock. The reasonable value of said shares at said time was \$1,000,000.

47 $\frac{1}{2}$ % or thereabouts of the outstanding capital stock of California Pacific Service Corporation, a California corporation, operating a

laundry at Bakersfield, California. The reasonable value of said shares at said time was approximately \$25,000.00.

52% of the outstanding capital stock of Pacific Empire Corporation, a California corporation. The reasonable value of said shares at said time was approximately \$75,000.00.

and basing their denial upon that ground, generally and specifically, deny each and every, all and singular the said allegation. Defendants deny that said shares of Merchants Ice & Cold Storage Company had a reasonable value on [21] December 31, 1940 of \$1,000,000 and allege that said shares at said time were of a value not to exceed \$35,000.00.

d. These answering defendants deny that on December 31, 1940 or at any time subsequent to September 24, 1936 Pacific Empire Corporation, a California corporation, held in pledge or had a lien upon 3990 shares of preferred and 49,944 $\frac{1}{4}$ shares of common stock of Merchants Ice & Cold Storage Company, or any other shares of Merchants Ice & Cold Storage Company stock as security for notes and accounts payable to Pacific Empire Corporation, in the amount of \$136,855.34 or any amount thereof, or as security for any amount whatsoever.

e. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments that all of the other assets of Pacific Empire Holdings, Inc. were in pledge at said time to secure other obligations of Pacific Empire Hold-

ings, Inc. and that in addition thereto Pacific Empire Holdings, Inc. owed other unsecured obligations of approximately \$100,000.00 and that said obligations were all due and payable and the only assets available for payment thereof, were the assets specifically mentioned in paragraph 6 of the complaint on file herein and basing their denial upon that ground deny generally and specifically, all and singular said allegations.

5. Answering the allegations of paragraph 7 thereof, these answering defendants deny generally and specifically, each and every, all and singular, the said allegations. Further answering said allegations, these answering defendants allege that on or about December 31, 1940 the Board of Directors of Pacific Empire Holdings, Inc. consisted of six directors, namely, M. Maffei, A. A. Herr, Jr., L. R. Arnold, Luigi Giachino, Webb Richards and T. M. Ryerson, and at said time the said corporation had an Executive Committee composed of two members, namely, M. Maffei and L. R. Arnold.

6. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 thereof, and basing their denial upon that ground, deny, generally and specifically, each and every, all and singular the allegations in said paragraph contained.

7. Answering the allegations of paragraph 9 thereof, defendants deny, generally and specifically, each and every, all and singular the allegations [22] in said paragraph contained.

8. Answering the allegations of paragraph 10 thereof, these answering defendants deny that the said 78,358 shares of the capital stock of Merchants Ice & Cold Storage Company were on December 31, 1940 reasonably worth the sum of \$1,000,000.00 and allege in this behalf that said shares at said time were of a value not to exceed \$35,000.00. Deny that the said shares of said corporation were worth the sum of \$1,000,000.00 on or about October 20, 1942, the date of the filing of the complaint herein or at any time thereabouts or thereafter to the date hereof; and in this behalf allege that the exact value of said shares at said time is uncertain and unknown to defendants.

9. a. Answering the allegations of paragraph 11 thereof, defendants deny, generally and specifically, each and every, all and singular the allegations in said paragraph contained.

b. In this behalf these answering defendants allege that under and pursuant to the provisions of said agreement Exhibit B. defendant Peter Bercut purchased shares of stock of Merchants Ice & Cold Storage Company therein described for the sum of \$35,000.00 from Pacific Empire Holdings, Inc.

c. Defendants allege that said agreement Exhibit B. was duly, properly and legally, executed for and on behalf of said corporation, by M. Maffei as president, and L. R. Arnold as secretary, and that said agreement made and constituted an agreement of sale of said shares for and on behalf of said corporation to Peter Bercut. Said agreement and the

terms thereof were in all respects fair and equitable to the corporation, and said agreement was entered into after lengthy negotiations by and between the said corporation and the said Peter Bercut and upon a full disclosure of all facts relating thereto. The price paid for said shares to wit, the sum of \$35,000.00 was a fair and proper price for said shares and the said contract was in all respects beneficial to said corporation, was entered into under proper corporate authority by officers duly authorized to act for and on behalf of said corporation, and was and is fully binding upon said corporation.

10. a. Answering the allegations of paragraph 12 thereof, defendants deny generally and specifically, each and every, all and singular, the allega- [23] tions in said paragraph contained.

b. In this regard these answering defendants allege that Peter Bercut for and on his own behalf and for and on behalf of the defendant Henri Bercut purchased the shares of stock in Merchants Ice & Cold Storage Company therein described from Pacific Empire Holdings, Inc. for the sum of \$35,000.00. That said Pacific Empire Holdings, Inc. with \$25,000.00 from and out of the said sum of \$35,000.00 so paid, paid an indebtedness owing by it to Merchants Ice & Cold Storage Company.

c. Defendants Jean Bercut and Ernest E. Bercut have and claim no right, title or interest in or to said shares.

11. Answering the allegations of paragraph 13 thereof, these answering defendants admit that the

shares of Merchants Ice & Cold Storage Company referred to are now held and owned by Peter Bercut and Henri Bercut and allege that Jean Bercut and Ernest E. Bercut have and claim no right, title or interest in or to said shares or any part thereof.

12. Answering the allegations of paragraph 14 thereof, these answering defendants deny generally and specifically, each and every, all and singular the allegations in said paragraph contained.

Defendants admit that plaintiff herein delivered a purported notice of repudiation of said transaction to Peter Bercut prior to the institution of this action.

13. Answering the allegations of paragraph 15 thereof, these answering defendants deny generally and specifically, each and every, all and singular the allegations in said paragraph contained.

Defendants admit that plaintiff has made a demand on Peter Bercut for the return of said shares to plaintiff and deny each and every, all and singular the remaining allegations contained in said paragraph.

As and for an answer to the second cause of action set forth in said claim, these answering defendants admit, deny and allege as follows:

1. Answering the allegations of paragraph 1 thereof, defendants incorporate herein by reference, their answers to paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 17 of the first cause of action of the complaint on file herein, as if said answers were herein set forth in full. [24]

2. Answering the allegations of paragraph 3 thereof, these answering defendants deny that the said 78,358 shares of the capital stock of Merchants Ice & Cold Storage Company were on or about January 8, 1941, reasonably worth the sum of \$1,000,000.00 and allege in this behalf that said shares at said time were of a value not to exceed \$35,000.00. Deny that the said shares of said corporation were worth the sum of \$1,000,000.00 on or about October 20, 1942, the date of the filing of the complaint herein, or at any time thereabouts or thereafter to the date hereof; and in this behalf allege that the exact value of said shares at said time is uncertain and unknown to defendants.

3. Answering the allegations of paragraph 4 thereof, these answering defendants deny generally and specifically, each and every, all and singular the allegations in said paragraphs contained.

4. Answering the allegations of paragraph 5 thereof, these answering defendants admit that plaintiff demanded delivery of said shares from Peter Bercut on or about September 28, 1942, and that Peter Bercut refused to deliver the said shares to plaintiff. Defendants deny that said shares were unlawfully and erroneously withheld from the possession of plaintiff to his damage in the sum of \$1,000.00 or any part thereof or in any sum whatsoever.

As and for an answer to the third cause of action set forth in said complaint, these answering defendants admit, deny and allege as follows:

1. Answering the allegations of paragraph 1 thereof, defendants incorporate herein by reference, their answers to paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 17 of the first cause of action of said complaint on file herein, as if said answers were herein set forth in full.

2. Answering the allegations of paragraph 3 thereof, these answering defendants deny that the said 78,385 shares of the capital stock of Merchants Ice & Cold Storage Company were on or about January 8, 1941, reasonably worth the sum of \$1,000,000.00 and allege in this behalf that said shares at said time were of a value not to exceed \$35,000.00. Deny that the said shares of said corporation were worth the sum of \$1,000,000.00 on or about October 20, 1942, the date of the filing of the complaint herein, or at any time thereabouts or thereafter to the date hereof; and in this behalf allege that the [25] exact value of said shares at said time is uncertain and unknown to defendants.

3. Answering the allegations of paragraphs 4 and 5 thereof, these answering defendants deny generally and specifically, each and every, all and singular the allegations in said paragraphs contained. Deny that defendants or any of them became indebted and/or owe to plaintiff the sum of \$1,000,000.00 or any part thereof or any amount whatsoever.

I.

As and for a first, separate and special defense to the complaint on file herein and to each and all of

the causes of action therein set forth, these answering defendants allege:

1. That said complaint on file herein fails to state a claim upon which relief can be granted against these defendants.

2. That the first cause of action set forth in said complaint fails to state a claim upon which relief can be granted against these defendants.

3. That the second cause of action set forth in said complaint fails to state a claim upon which relief can be granted against these defendants.

4. That the third cause of action set forth in said complaint fails to state a claim upon which relief can be granted against these defendants.

5. That the said complaint on file herein, and each and all of the causes of action therein set forth fail to state a claim upon which relief can be granted against these defendants, in that it appears therefrom that Pacific Empire Corporation claims some right, title or interest in and to the shares of Merchants Ice & Cold Storage Company, the subject of this action and is therefore a necessary party to the determination of this action.

II.

As and for a second, separate and special defense to the complaint on file herein and to each and all of the causes of action therein set forth, these answering defendants allege:

1. That plaintiff has not the legal capacity to sue herein. [26]

III.

As and for a third, separate and special defense to the complaint on file herein, and to each and all of the causes of action therein set forth, these answering defendants allege:

1. That the contract, Exhibit B attached to the complaint at all times from and after its execution, was and still is in full and legal force and effect between the parties and that the said contract has not been lawfully rescinded or modified in any respect whatsoever.

IV.

As and for a fourth, separate and special defense to the complaint on file herein, and to each and all of the causes of action therein set forth, these answering defendants allege:

1. That each and all of the causes of action set forth in the complaint is, and are, barred by laches.

In this respect defendants allege that at the time of the execution of the contract Exhibit B attached to the complaint the said Merchants Ice & Cold Storage Company was in an insolvent condition, that it had no funds with which to meet its pay-rolls and was about to collapse financially and that said circumstances were at said time fully known to Pacific Empire Holdings, Inc. and to its officers, directors and stockholders and to the general public. Defendants further allege that the execution of the contract Exhibit B, attached to the complaint, by the defendant Peter Bercut and by Pacific Empire Holdings, Inc., and all of the facts and circum-

stances relating thereto were at said time fully known to the said Pacific Empire Holdings, Inc. its officers, directors and stockholders and were a matter of public knowledge. The sum of \$35,000.00 paid for said shares by Peter Bercut was a fair and generous price and in excess of the value of said shares in the market at and about the time of the making of said contract.

That the defendant Peter Bercut promptly and immediately performed all of the terms and conditions of the contract Exhibit B required to be performed by him and thereupon and immediately thereafter assumed the presidency and management of the Merchants Ice & Cold Storage Company and has [27] continuously since the said 8th day of January 1941 devoted himself and his financial resources to the rehabilitation and development of the business of the said Merchants Ice & Cold Storage Company. As a result thereof the said Merchants Ice & Cold Storage Company has and had at and about the time of the filing of the complaint herein, a large and active business and is and was then operating upon a profitable basis. The acts of the said defendant Peter Bercut in this connection have been open and overt and at all times since January 8, 1941, have been fully known to the officers, directors and stockholders of the said Pacific Empire Holdings, Inc. and at all times since the said 8th day of January, 1941, the said Pacific Empire Holdings, Inc. its officers, directors and stockholders have been fully aware of the acts and conduct of

the said Peter Bercut in building up and developing the business of the said Merchants Ice & Cold Storage Company, in reliance upon his ownership of the shares of the Merchants Ice & Cold Storage Company purchased by him under the terms of the contract, Exhibit B. As a result thereof the shares of Merchants Ice & Cold Storage Company purchased by Peter Bercut have greatly appreciated and enhanced in value.

V.

As and for a fifth, separate and special defense to the complaint on file herein, and to each and all of the causes of action therein set forth, these answering defendants allege:

1. These answering defendants incorporate herein all the allegations set forth in their fourth special and separate defense.

2. That by reason of the matters and things herein set forth, Pacific Empire Holdings, Inc., a corporation, plaintiff's predecessor, and plaintiff, have acquiesced in and consented to the execution of the contract, Exhibit B, attached to the complaint, by and between Peter Bercut and Pacific Empire Holdings Inc. and have acquiesced and consented to the acts and conduct of Peter Bercut in reliance upon said contract as hereinbefore alleged, and by reason of such acquiescence and conduct on their part are estopped from denying or questioning the validity of said contract. [28]

Wherefore, defendants pray that the complaint on file herein be dismissed; that judgment be en-

tered herein against plaintiff and in favor of these answering defendants for their costs of suit incurred herein.

Dated: December 14, 1942.

LOUIS E. GOODMAN
LOUIS H. BROWNSTONE
GOODMAN & BROWNSTONE
Attorneys for Defendants Peter
Bercut, Ernest E. Bercut, Henri
Bercut and Jean Bercut.

Receipt of Service.

[Endorsed]: Filed December 19, 1940. [29]

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS M. MAFFEI
AND L. R. ARNOLD

Come now defendants M. Maffei and L. R. Arnold, and for answer to the complaint of plaintiff on file herein, admit, deny and allege as follows, to wit:

I.

These defendants are without, and have not, sufficient knowledge, information or belief as to the truth of the allegations set forth in Paragraphs II, III, IV, VI and XIV in the first cause of action contained, each and every part thereof, and placing their denial on said grounds deny the said allegations of said paragraphs of said cause of action in said complaint.

II.

These defendants deny the allegations set forth in Paragraphs IX, X, XI, XII, XIII and XV in the said first cause of action in said complaint contained, each and every part thereof. [30]

III.

That said first cause of action in said complaint of plaintiff does not state facts sufficient to constitute a cause of action against these defendants, or either of them, or at all.

Wherefore, these defendants pray judgment that plaintiff's complaint be dismissed; that plaintiff take nothing by reason of his complaint on file herein; and that these defendants be hence dismissed with their costs of suit herein incurred.

And for answer to the second cause of action, these defendants admit, deny and allege as follows, to wit:

I.

These defendants are without, and have not, sufficient knowledge, information or belief as to the truth of the allegations set forth in Paragraphs II, III, IV and VI of the first cause of action, incorporated by reference in Paragraph I of the second cause of action in said complaint contained, and Paragraph VI of the second cause of action in said complaint contained, and placing their denial on said grounds deny the allegations of said paragraphs in said second cause of action in said complaint contained.

II.

Deny the allegations of Paragraphs IV and V of the second cause of action in said complaint contained, each and every part thereof.

III.

That said second cause of action in said complaint of plaintiff does not state facts sufficient to constitute a cause of action against these defendants, or either of them, or at all.

Wherefore, these defendants pray judgment that plaintiff's complaint be dismissed; that plaintiff take nothing by reason of his complaint on file herein; and that these defendants be hence [31] dismissed with their costs of suit herein incurred.

And for answer to the third cause of action, these defendants admit, deny and allege as follows, to wit:

I.

These defendants are without, and have not, sufficient knowledge, information or belief as to the truth of the allegations set forth in Paragraphs II, III, IV and VI of the first cause of action, incorporated by reference in Paragraph I of the third cause of action in said complaint contained, and Paragraph III of the third cause of action in said complaint contained, and placing their denial on said grounds deny the allegations of said paragraphs in said third cause of action in said complaint contained.

II.

These defendants deny the allegations set forth in Paragraphs II, IV and VI in the said third cause of action in said complaint contained, each and every part thereof.

III.

That said third cause of action in said complaint of plaintiff does not state facts sufficient to constitute a cause of action against these defendants, or either of them, or at all.

Wherefore, these defendants pray judgment that plaintiff's complaint be dismissed; that plaintiff take nothing by reason of his complaint on file herein; and that these defendants be hence dismissed with their costs of suit herein incurred.

J. A. PARDINI &

ELDA GRANELLI

Attorneys for Defendants M. Maffei
and L. R. Arnold [32]

State of California,
City and County of San Francisco—ss.

M. Maffei, being first duly sworn, deposes and says:

That he is one of the defendants in the above-entitled action; that he has read the foregoing answer to complaint and knows the contents thereof; that the same is true of his own knowledge, save and except as to those matters which are therein stated on information or belief and as to those matters he believes it to be true.

M. MAFFEI

Subscribed and sworn to before me, this 30th day of December, 1942.

[Seal]

JOHN F. BURNS

Notary Public in and for the City and County of San Francisco, State of California. My Commission expires April 12, 1945.

[Endorsed]: Filed Dec. 31, 1942. [33]

[Title of District Court and Cause.]

AMENDMENT TO ANSWER AND
COUNTERCLAIM

Now come defendants, Peter, Ernest E., Henri and Jean Bercut, and by written consent of the adverse party and order of Court first had and obtained, amend their answer filed herein and for a sixth separate and special defense to the complaint on file herein, and to each and all of the causes of action therein [34] set forth and by way of counterclaim, allege as follows:

(1) That pursuant to the terms of that certain agreement by and between Peter Bercut and Pacific Empire Holdings, Incorporated dated January 8, 1941, a copy of which is attached to the complaint on file herein and marked Exhibit B, Peter Bercut, for and on his own behalf and for and on behalf of defendant, Henri Bercut, purchased from the said corporation 78,358 shares of stock of Merchants Ice & Cold Storage Company, consisting of 12,495 shares of Preferred stock and 65,863 shares of Com-

mon stock for the total purchase price of \$35,000.00.

(2) On or about said date the said Peter Bercut paid to said corporation the sum of \$35,000.00, the full purchase price for said shares, and said Peter Bercut has fully performed each and all of the terms, covenants, agreements and conditions required to be performed by him under the terms, provisions and conditions of said agreement.

(3) Pursuant to said agreement the said corporation delivered to Peter Bercut on account of the shares so sold, 6,670 shares of Preferred stock and 62,341 shares of Common stock of Merchants Ice & Cold Storage Company. In order to obtain possession of $5,516\frac{2}{3}$ shares of Preferred stock so sold and at the express instance and request of Pacific Empire Holdings, Incorporated, on or about April 1, 1941 defendants, Peter and Henri Bercut, were compelled to, and did, advance and expend the sum of \$3,950.00 in payment of a claim against Pacific Empire Holdings, Incorporated, secured by a pledge of said $5,516\frac{2}{3}$ shares, and the said corporation promised and agreed in writing to repay said sum.

(4) Subsequent to January 8, 1941 and as aforesaid, Pacific Empire Holdings, Incorporated delivered to Peter Bercut $12,186\frac{2}{3}$ shares of Preferred stock and 62,341 shares of Common [35] stock of Merchants Ice & Cold Storage Company. Pursuant to the terms and provisions of the agreement dated January 8, 1941 the said corporation has failed and refused to deliver to Peter Bercut the balance of $308\frac{1}{3}$ shares of Preferred stock and $2,047\frac{1}{3}$ shares.

of Common stock of Merchants Ice & Cold Storage Company required to be delivered thereunder.

Defendants, Peter and Henri Bercut, and each of them, have demanded payment of the sum of \$3,950.00 and delivery of $308\frac{2}{3}$ shares of Preferred stock and $2,047\frac{1}{3}$ shares of Common stock of Merchants Ice & Cold Storage Company, of and from plaintiffs but said plaintiffs have failed and refused to pay said sum or any part thereof, save and except the sum of \$100.00, or to deliver said shares, or any part thereof, to said defendants, or either of them.

Wherefore, these defendants, and each of them, pray that the complaint on file herein be dismissed, that judgment be entered herein in favor of defendants, Peter and Henri Bercut, and against plaintiffs for the sum of \$3,850.00, and interest thereon, and for the delivery of $308\frac{2}{3}$ shares of Preferred stock and $2,047\frac{1}{3}$ shares of Common stock of Merchants Ice & Cold Storage Company, or if such delivery cannot be had, for the value thereof, for their costs of suit incurred herein and for such other and further relief as may be proper.

Dated: April 9, 1943.

LOUIS H. BROWNSTONE

Attorney for Defendants,
Peter, Ernest E., Henri
and Jean Bercut. [36]

It is hereby stipulated by and between the parties hereto that the foregoing amendment to answer and counterclaim may be deemed denied generally and specifically by the plaintiff as to each and every allegation therein contained and, further, that it may be deemed denied by the plaintiff that Pacific Empire Holdings, Incorporated, is in any way indebted for any amount whatever to Peter Bercut, Ernest E. Bercut, Henri Bercut or Jean Bercut as alleged by them in their said amendment to answer and counterclaim.

It is further stipulated that said amendment to answer and counterclaim with this stipulation may be filed herein.

A. J. SCAMPINI

L. F. MAHAN

ELLIS & STEINDORF

CONRAD T. HUBNER

Attorneys for Plaintiffs

LOUIS H. BROWNSTONE

Attorney for Defendants

Peter, Ernest E., Henri
and Jean Bercut.

So Ordered.

MICHAEL J. ROCHE

District Judge.

[Endorsed]: Filed Apr. 12, 1943. [37]

[Title of District Court and Cause.]

REQUEST FOR ADMISSION OF FACTS AND
OF GENUINENESS OF DOCUMENTS,
PURSUANT TO RULE 36 OF THE RULES
OF CIVIL PROCEDURE, AND OF INTER-
ROGATORIES PROPOUNDED TO THE
DEFENDANT PETER BER CUT, PUR-
SUANT TO RULE 33 OF THE RULES OF
CIVIL PROCEDURE, WITH RESPECT TO
SAID DOCUMENTS.

To the defendant Peter Bercut and to Louis Brownstone, Esq., his attorney:

The above named plaintiff does hereby request, pursuant to Rule 36 of the Rules of Civil Procedure, that the defendant, Peter Bercut admit (1) that the original document, copy of which is attached as plaintiff's exhibit "4" to the deposition of L. R. Arnold (said document purporting to be the resignation of Peter [38] Bercut as an officer and director of Pacific Empire Holdings, Incorporated) was executed by him, signed by him and delivered by him to L. R. Arnold.

(2) Plaintiff requests of the said defendant, pursuant to Rule 33 of the Rules of Civil Procedure, that he answer separately and fully in writing, under oath, within fifteen days from date of this request, the following interrogatories:

(a) State whether or not the document, a copy of which is attached to the deposition of L. R. Arnold as plaintiff's Exhibit No. "4" and which document purports to be your resignation as an

officer and director of Pacific Empire Holdings, Incorporated, was signed by you on the date it purports to bear, namely: March 31, 1940.

(b) If your answer to the foregoing question is in the negative please state on what date the said document was signed by you.

(c) To whom, when and where did you deliver the said document?

(d) State as fully as possible the time, place and circumstances under which the said document was prepared, signed and delivered by you.

(e) Did you sign and deliver any document of a substantially similar nature or character to Pacific Empire Corporation? If so, when and where and to whom delivered and the circumstances under which the same was delivered?

(f) When did you first become a director of Pacific Empire Holdings, Incorporated?

(g) When did you first become an officer of Pacific Empire Holdings, Incorporated and what office did you hold therein?

(h) When did you cease being a director of Pacific Empire Holdings, Incorporated? [39]

(i) When did you cease being an officer of Pacific Empire Holdings, Incorporated?

(j) State with whom you conducted the negotiations with respect to the purported purchase by you of the capital stock of Merchants Ice & Cold Storage Company owned by Pacific Empire Holdings, Incorporated, referred to in that certain letter agreement between Pacific Empire Holdings, Incor-

porated and Peter Bercut dated January 8, 1941, a copy of which is attached as plaintiff's Exhibit "3" to the deposition of L. R. Arnold.

(k) Have you, in your possession the original document, a copy of which is attached to the deposition of L. R. Arnold as plaintiff's Exhibit "3" and which purports to be the letter agreement between Pacific Empire Holdings, Incorporated and Peter Bercut dated January 8, 1941?

(l) Did you obtain any other document or evidence of sale of the shares of stock referred to in said letter agreement dated January 8, 1941 from Pacific Empire Holdings, Incorporated?

(m) If you have the original document of said letter agreement dated January 8, 1941, please deliver a photostatic copy thereof to plaintiff.

(n) Please name the officers and directors of Pacific Empire Holdings, Incorporated, with whom you discussed the purported purchase by you from Pacific Empire Holdings, Incorporated, of the said shares of stock referred to in said letter agreement dated January 8, 1941.

(o) If you have the original of the said letter agreement dated January 8, 1941 does the said original document bear the seal of Pacific Empire Holdings, Incorporated thereon, and state by whom the said agreement was executed.

(p) If the said letter of resignation, dated March 31, 1940, a copy of which appears as plaintiff's Exhibit "4" to the deposition of L. R. Arnold, was not signed and delivered by you please state whether

you ever did deliver any letter of resignation [40] as an officer and director of Pacific Empire Holdings, Incorporated, to any of the officers of Pacific Empire Holdings, Incorporated, and if you have a copy of such letter of resignation please deliver a copy thereof to plaintiff and state to whom you delivered such letter of resignation. When, where and under what circumstances was the same delivered?

Dated: February 5th, 1943.

A. J. SCAMPINI

L. F. MAHAN

ELLIS & STEINDORF

CONRAD T. HUBNER

Attorneys for Plaintiff

Receipt of Service.

[Endorsed]: Filed April 17, 1943. [41]

[Title of District Court and Cause.]

REPLY TO REQUEST FOR ADMISSION OF
FACTS AND OF GENUINENESS OF
DOCUMENTS, PURSUANT TO RULE 36
OF THE RULES OF CIVIL PROCEDURE,
AND OF INTERROGATORIES PRO-
POUNDED TO THE DEFENDANT PETER
BERCUT, PURSUANT TO RULE 33 OF
THE RULES OF CIVIL PROCEDURE,
WITH RESPECT TO SAID DOCUMENTS.

Now comes the defendant, Peter Bercut, and re-
plying to the request for admission of facts and of

genuineness of documents, pursuant to Rule 36 of the Rules of Civil Procedure, and of interrogatories propounded to the defendant, Peter Bercut, pursuant to Rule 33 of the Rules of Civil Procedure, with respect to said documents, and alleges as follows:

1. Defendant admits that the original document, copy of [42] which is attached as plaintiff's exhibit 4 to the deposition of L. R. Arnold, was signed by him and delivered by him to L. R. Arnold.

2. Answering the requests of defendant for answers to interrogatories:

- (a) The document attached to the deposition of L. R. Arnold as plaintiff's exhibit 4, was not signed by this defendant on the date that it purports to bear, namely, March 31, 1940.

- (b) To the best of this answering defendant's knowledge, the document was signed on or about January 8, 1941.

- (c) The document referred to was delivered to L. R. Arnold at the office of Pacific Empire Holdings, Inc., 26 O'Farrell Street, San Francisco, California on the date that it was signed.

- (d) The document was signed and delivered at the time and place just hereinabove in paragraph 2(c) stated, after being produced by L. R. Arnold, and was signed by this answering defendant at the request of L. R. Arnold.

- (e) Answering paragraph 2(e) of the interrogatories no document of a substantially similar nature

or character was signed or delivered to Pacific Empire Corporation.

(f) This answering defendant first became a director of Pacific Empire Holdings, Inc. on or about February 15, 1933.

(g) This answering defendant first became an officer of Pacific Empire Holdings, Inc. on March 28, 1933, as Vice-President.

(h) This answering defendant ceased being a director of Pacific Empire Holdings, Inc. on or about March 31, 1940.

(i) This answering defendant ceased being an officer of Pacific Empire Holdings, Inc. on or about March 31, 1940.

(j) Negotiations with respect to the purchase by this answering defendant of the capital stock of Merchants Ice & Cold [43] Storage Company owned by Pacific Empire Holdings, Inc., referred to in that certain letter agreement between Pacific Empire Holdings, Inc. and Peter Bercut dated January 8, 1941, were conducted with L. R. Arnold and M. Maffei representing Pacific Empire Holdings, Inc.

(k) Defendant has in his possession the original document referred to in the previous paragraph of this answer to interrogatories.

(l) No other documents evidencing the sale of the shares of stock referred to in said letter agreement, other than the shares themselves, a proxy to vote Merchants Ice & Cold Storage Company shares executed by Pacific Empire Holdings, Inc. and dated January 8, 1941, and letters referring to the said

sale, all of said letters bearing a date subsequent to January 8, 1941, were obtained by this answering defendant.

(m) Answering paragraph 2(n) of said interrogatories, the purchase by this answering defendant of the shares of stock referred to in said letter agreement dated January 8, 1941 was discussed by this answering defendant with M. Maffei, President and director, and L. Arnold, Secretary and director of Pacific Empire Holdings, Inc.

(n) The original of said letter agreement dated January 8, 1941 bears the seal of Pacific Empire Holdings, Inc. and was executed for and on behalf of said corporation by M. Maffei, President and L. R. Arnold, Secretary of said corporation.

(o) Answering paragraph 2(p) of said interrogatories, the letter of resignation dated March 31, 1940 therein referred to was signed and delivered by this answering defendant.

PETER BER CUT

Subscribed and sworn to before me this 17th day of February, 1943.

[Seal]

LOUIS WIENER

Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Feb. 23, 1943. [44]

[Title of District Court and Cause.]

STIPULATION PERMITTING USE
OF DEPOSITIONS

Whereas, in that certain action entitled "Thomas H. Wingate, as Receiver in Equity for Pacific Empire Holdings, Incorporated, a corporation of the State of Delaware, and Pacific Empire Holdings, Incorporated, a corporation of the State of Delaware, Plaintiffs, vs. Peter Bercut, Ernest E. Bercut, Henri Bercut, Jean Bercut, et al," being action No. 312,800, in the Superior Court of the State of California, in and for the City and County of San Francisco, which action has now been dismissed without prejudice, certain depositions were taken on behalf of plaintiff, to-wit: the depositions of L. R. Arnold, Leona Keener and A. A. Heer, Jr.; and

Whereas, a deposition of A. A. Heer, Jr. was taken in that certain action entitled "Pacific Empire Corporation vs. Peter Bercut, et al," being action No. 313,269, in the office of the Clerk of said court; and [45]

Whereas, the above named plaintiff now desires to take the depositions of L. R. Arnold, Leona Keener and A. A. Heer, Jr., for use on behalf of plaintiff in the above entitled action;

Now, Therefore, in lieu of again taking said depositions it is hereby stipulated by and between the undersigned that the said depositions of L. R. Arnold, A. A. Heer, Jr., and Leona Keener may be used by either of the parties to this action at the

trial of the above entitled action, subject to all of the exceptions, objections and reservations made during the taking of said depositions and as in said depositions expressed.

Dated: San Francisco, California, October 27, 1942.

A. J. SCAMPINI
ELLIS & STEINDORF
CONRAD T. HUBNER
L. F. MAHAN

Attorneys for Plaintiff
Thomas H. Wingate, as
Receiver in Equity for
Pacific Empire Hold-
ings, Inc., a Delaware
corporation.

LOUIS E. GOODMAN &
LOUIS H. BROWNSTONE
GOODMAN & BROWNSTONE

Attorneys for Defendants Peter Bercut, Ernest
E. Bercut, Henry Bercut and Jean Bercut.

J. A. PARDINI

Attorney for Defendants M. Maffei and L. R.
Arnold.

[Endorsed]: Filed Dec. 31, 1942. [46]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

Tuesday, April 20, 1943

Counsel Appearing:

For Plaintiff: A. J. Scampini, Esq., Ivan Culbertson, Esq., L. F. Mahan, Esq., Ellis & Steindorf, C. T. Hubner, Esq.

For Defendants: Louis H. Brownstone, Esq., George M. Naus, Esq., J. A. Pardini, Esq.

Mr. Scampini: At this time if your Honor please I wish to offer in evidence an exemplified copy of order of appointment of receiver.

The Court: It may be admitted and marked.

(Copy of order is marked "Plaintiff's Exhibit 1.")

PLAINTIFF'S EXHIBIT 1

In the Court of Chancery of the State of Delaware
in and for New Castle County

REBECCA TANZER and ELIZABETH
WILHELM,

Complainants,

vs.

PACIFIC EMPIRE HOLDINGS, INCORPORATED, a corporation of the State of Delaware,

Defendant.

BILL FOR RECEIVER

And now, to-wit, this 31st day of August, A. D. 1942, the Bill of Complaint in the above entitled

cause, with the Answer of the defendant admitting the allegations of said Bill and consenting to the granting of the relief prayed for, being duly presented, and it appearing therefrom that the defendant is a corporation organized and existing under the laws of the State of Delaware, that complainant is a creditor and stockholder thereof, that the defendant is insolvent in the equity sense, in that it is unable to pay its obligations as they mature in due course of business, that defendant is not a corporation for public improvement, and that the appointment of a Receiver or Receivers of said defendant by this Court would be for the benefit of its creditors and stockholders,

It is ordered, adjudged and decreed by the Chancellor that Thomas H. Wingate, of the City of Wilmington, State of Delaware, be and he is hereby appointed Receiver of Pacific Empire Holdings, Incorporated, the defendant herein, to take charge of the estate, effects, business and affairs thereof, to collect the outstanding debts, claims and property due and belonging to the said defendant, with power to prosecute and defend in the name of said defendant, or otherwise, all claims and suits; to appoint an agent or agents under said Receiver, and, subject to the approval of the Chancellor, to do all other acts which might be done by said corporation that may be necessary and proper; and with power to compromise, adjust, and settle claims which the defendant has against any person, firm, or corpora-

tion, or which may be due to the defendant by any person, firm, or corporation;

And it is further ordered that said defendant, its President, directors, officers, agents, servants, and attorneys be and they are each of them hereby restrained and expressly enjoined, until further order of the Chancellor, from receiving, collecting or compromising any debts due or belonging to defendant and from paying out, selling, assigning or transferring any property, estate, moneys, funds, lands, tenements or effects of any description whatsoever belonging to said defendant to any person other than the Receiver hereby appointed;

And it is further ordered that said defendant, its President, directors, officers, agents, servants and attorneys, shall forthwith deliver to said Receiver the property and effects thereof and all books, records and papers touching the same and pertaining to its business and affairs in its or their possession or custody;

And it is further ordered, that pursuant to paragraph 2075 Section 43, of the Revised Code of the State of Delaware of 1935, said Receiver shall be and hereby is vested by operation of law, without any act or deed, with the title of said defendant to all its books, papers and documents, interests in patents, patent rights, copyrights and trademarks, rights of action arising upon contracts or from the unlawful taking or detention of or injury to property of said defendant; and other property, real, personal or mixed, of whatsoever nature, kind,

class or description, and wheresoever situate, except real estate situate outside of the State of Delaware;

And it is further ordered that said Receiver, within five days from this date, shall give bond in the usual form in the sum of Two Thousand (\$2000.00) Dollars, with surety approved by the Chancellor, conditioned for the faithful performance of his duties as such Receiver, and National Surety Company, a corporation of the State of New York, is hereby approved as surety on said bond;

And it is further ordered that the Chancellor reserves the right to make such further order or orders, decree or decrees herein as to him shall seem proper.

/s/ WM. WATSON HARRINGTON
Chancellor.

State of Delaware,
New Castle County—ss.

I, Anthony F. Emory, Register of the Court of Chancery of the State of Delaware, in and for New Castle County, do hereby certify that the foregoing is a true and correct copy of Order signed by the Chancellor August 31, A. D. 1942, appointing Thomas H. Wingate, Receiver of Pacific Empire Holdings, Incorporated, said receiver having duly filed the requisite bond, and said appointment being in full force *an* effect, as the same remains on file and of record in said Court.

In Testimony Whereof, I have hereunto, set my hand and affixed the seal of said Court, at Wilmington, this 16th day of April in the year of our Lord, nineteen hundred and Forty-Three.

[Seal]

ANTHONY F. EMORY

Register in Chancery.

State of Delaware, to wit:

I, William Watson Harrington, Chancellor of the State of Delaware, do hereby certify that the foregoing Record and Attestation, made by Anthony F. Emory, Esquire, Register in Chancery within the County of New Castle, whose name is thereto subscribed, and to which the seal of said Court is affixed, are in due form of law, and made by the proper officer.

In Testimony Whereof, I have hereunto set my hand, this 16th day of April in the year of our Lord, nineteen hundred and Forty-Three.

WM. WATSON HARRINGTON

Chancellor.

State of Delaware,
New Castle County—ss.

I, Anthony F. Emory, Register of the Court of Chancery of the State of Delaware, in and for New Castle County, do hereby certify that the Honorable William Watson Harrington, by whom the foregoing attestation was made and whose name is thereto subscribed, was at the time of the making thereof, and still is Chancellor of the State of Delaware, duly commissioned and sworn, to all

whose acts, as such full faith and credit are and ought to be given, as well in Courts of Justice as elsewhere.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court, at Wilmington, this 16th day of April in the year of our Lord, nineteen hundred and Forty-Three.

[Seal]

ANTHONY F. EMORY

Register in Chancery.

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22339R. Plfs. Ex. No. One. Filed 4-20-43. Walter B. Maling, Clerk. J. P. Welsh, Deputy Clerk.

MICHAEL MAFFEI,

called as a witness for Plaintiff; sworn.

Mr. Scampini: Q. Mr. Maffei, will you give your full name? A. Michael Maffei.

Q. What is your business or occupation or activity at the present time?

A. I am in the macaroni business.

Q. What company are you associated with?

A. The Italian American Pastry Company.

Q. What position do you hold there?

A. President. [49]

Q. Prior to becoming president of the Italian American Pastry Company were you connected with the Pacific Empire Holdings, Incorporated?

A. Yes.

Q. Until on or about when, Mr. Maffei?

A. I think about between six and eight months ago.

(Testimony of Michael Maffei.)

Q. Upon the appointment of the receiver, is that correct? A. Yes.

Q. What was your position in the company?

A. President.

Q. Pacific Empire Holdings, Incorporated, was a Delaware corporation? A. It was.

Q. Organized under the laws of the State of Delaware? A. That is right.

Q. And when was it created or organized, as far as you know? A. I think in the year 1930.

Q. Will you state briefly the origin of this corporation?

A. Originally it was Calitalo Investment Corporation, a California corporation.

Q. Was there an old corporation known as the Brotherhood Investment Company?

A. Brotherhood Investment Company, and it was reorganized and made the Calitalo Investment Company.

Q. If I understand you correctly, the Calitalo Investment Corporation was organized for the purpose of taking over the Brotherhood Investment Company?

A. The Calitalo Investment Company was organized for the purpose of taking over the assets of the Brotherhood Investment Company and the Associated Calitalo Investment Company for the purpose of taking over the Calitalo.

Q. Now, The Associated Calitalo Holdings Inc. was of course a Delaware corporation?

A. Yes.

(Testimony of Michael Maffei.)

Q. Did that company on or about the year 1934 change its cor- [50] porate name? A. It did.

Q. To what?

A. Pacific Empire Holdings, Incorporated.

Q. When did you first become connected with the Pacific Empire Holdings, Inc., or its predecessor? A. Well, about 1929.

Q. In what capacity?

A. As president of the Calitalo Investment Company.

Q. How long did you continue to be president of the Calitalo Investment Corporation, or its successor in interest, the Pacific Empire Holdings, Incorporated?

A. I think it was about until 1930 or 1931, and then we incorporated the Associated Calitalo Investment Company.

Q. You became the president of the new corporation? A. That is it.

Q. And you continued to be the president right down to the present time, isn't that right?

A. I did.

Q. How many stockholders, approximately, did Pacific Empire Holdings, Incorporated, have, to your knowledge?

A. I don't know exactly, around nine or ten thousand.

Q. Will you state briefly what the activities of the Brotherhood Investment Company and its suc-

(Testimony of Michael Maffei.)

cessor in interest, the Associated Calitalo Holdings, Inc. were during the years, say, 1931, 1932?

A. It was an investment company, an investment holding company.

Q. Among its assets, what did it own?

A. Well, we had a bank in Portland, a bank in Seattle, one in Rio Vista, one in San Francisco, one at Courtland, one at Tenino, Washington.

Q. The bank in San Francisco, which you referred to, what was its name?

A. The City National Bank of San Francisco.

Q. How many shares, approximately, did the company of which *you president* own in this bank?

A. I don't remember.

Q. I mean what proportion?

A. We had about 51 per cent. [51]

Q. Was William A. Sherman president of the City National Bank of San Francisco?

A. That is right.

Q. And you were the president of the holding company? A. Yes.

Q. In addition to those assets of the companies or banks which you have described, did the Associated Calitalo Holdings, Incorporated, own any other assets that you can recall?

A. Well, they had an insurance agency in Los Angeles, and they had some interest in the Merchants Ice & Cold Storage Company.

Q. What year are you referring to?

A. Back in 1932 or 1933, something like that.

(Testimony of Michael Maffei.)

Q. Did it have any notes or obligations of the Brotherhood of Locomotive Engineers?

A. Yes, it had notes in the amount of \$470,000.

Q. 6 per cent notes?

A. 6 per cent notes.

Q. Do you recall when Peter Bercut became associated with or connected in an official capacity with the Pacific Empire Holdings, Incorporated, or its predecessor company?

A. Mr. Bercut became a director, I think, at the same time I became president.

Q. Do you recall when Mr. Peter Bercut became connected with the Pacific Empire Holdings, Incorporated?

A. Well, I think when Pacific Empire Holdings, Incorporated was formed.

Q. When was it formed?

A. I don't recall exactly.

Q. In 1933, or thereabouts?

A. At the time the corporation was formed he was a director.

Q. Can you state, generally, the purpose of forming the Pacific Empire Corporation?

A. That was formed for the sole purpose of taking over the assets of the City National Bank.

Q. Which bank had been liquidated at that time? A. That is right.

Q. Had the City National Bank been sold or merged with the Pacific National Bank at that time?

(Testimony of Michael Maffei.)

A. They were merged for so [52] many shares in the Pacific National Bank.

Q. So that the City National Bank of San Francisco acquired a block of shares in the Pacific National Bank as a result of this merger?

A. Yes.

Q. Can you state approximately how many shares there was acquired by the City National Bank in the Pacific National Bank?

A. I think it originally was fifteen hundred and some shares.

Q. The purpose, you said, for the organization of the Pacific Empire Corporation was to take over all of the assets of the City National Bank of San Francisco which was then in the course of liquidation?

A. That is right.

Q. Can you state who was liquidating agent of the City National Bank of San Francisco?

A. Mr. L. R. Arnold.

Q. Was Mr. Arnold connected with the Pacific Empire Holding Company?

A. Yes.

Q. What was his position?

A. He was secretary and treasurer.

Q. Was he a director?

A. A director.

Q. Did you have any executive committee in Pacific Empire Holding Company?

A. Yes, I and Mr. Bercut and Mr. Arnold.

Q. Mr. Arnold acted as liquidating agent for City National Bank of San Francisco?

A. Yes.

(Testimony of Michael Maffei.)

Q. How many shares did the Pacific Empire Holding, Inc. acquire in Pacific Empire Corporation?

A. They had about 52 per cent. of the stock.

Q. What did the Pacific Empire Corporation acquire as a result of the transaction?

A. So many shares of stock in the Pacific Empire Holdings, Incorporated, and some notes.

Q. All of the assets in the possession of the liquidating agent?

A. That is right.

Q. Which included this block of stock in the City National Bank [53] from the Pacific National Bank?

A. Yes.

Q. Who were the directors of the Pacific Empire Corporation, if you recall?

A. Myself, Mr. Bercut, Mr. Stratton, Mr. Vincent.

Q. You said, if I recall correctly, that sometime in the year 1931 Pacific Empire Holdings, Incorporated, or its predecessor, had a small interest in Merchants Ice & Cold Storage Company.

A. That is right.

Q. Did it thereafter acquire a substantial interest in Merchants Ice & Cold Storage Company?

Mr. Naus: You say it had a small interest in 1931. He said that was in 1932 or 1933.

Mr. Scampini: Q. When did the Pacific Empire Holdings, Incorporated first acquire any interest in the Merchants Ice & Cold Storage Company?

A. Well, right around 1930 or 1931 they had a

(Testimony of Michael Maffei.)

few shares, but the big interest was when they took over the McInerney stock and the Sherman stock, and Vincent and Stratton.

Q. When did that transaction take place?

A. The minute book will show the whole transaction.

Q. Do you recall approximately for what price the block of shares was acquired from the parties whom you have named of the Merchants Ice & Cold Storage Company?

A. Well, about \$250,000.

Q. As the result of the acquisition of this block of shares by the holding company from those individuals whom you have named was voting control acquired of the Merchants Ice & Cold Storage Company? A. Yes.

Q. Who at that time was the president of the Merchants Ice & Cold Storage Company, when the voting control or the major ownership, as it were, was acquired? A. William A. Sherman.

Q. He had been president of the City National Bank of San Francisco? [54]

A. That is correct.

Q. From there he went to the Calitalo?

A. He was president.

Q. He was president? A. Yes.

Q. William A. Sherman is now dead?

A. He is dead.

Q. Was Mr. Bercut a director of the Pacific Empire Holdings, Incorporated at the time that

(Testimony of Michael Maffei.)

this block of stock was acquired from these individuals? A. He was.

Q. Did the holding company thereafter, after the acquisition of this block of stock, acquire any further shares of Merchants Ice & Cold Storage Company? A. They did.

Q. From time to time?

A. From time to time.

Q. And on January 8, 1941, or thereabouts, will you state whether or not the holding company owned 65,863 shares of the common stock and 12,495 shares of the preferred stock of the Merchants Ice & Cold Storage Company? A. In what year?

Q. January 8, 1941.

A. In that neighborhood, yes.

Q. And all of the stock originated in the manner in which you have testified?

A. That is right.

Q. Can you state whether or not, on or about January 8, 1941, the aggregate cost of these two blocks of shares—can you state what was the aggregate cost, approximately?

A. I could not give the aggregate cost without looking at the books.

Q. Are the costs set forth in the books, to your knowledge? A. That is right.

Q. Now, when did Mr. Arnold first become connected with the Pacific Empire Holdings, Inc., or its predecessor?

(Testimony of Michael Maffei.)

A. I think it was in the neighborhood of either 1931 or 1932.

Q. From what position did he come, or where did he come from?

A. Well, he came from, I think, back East, or the East Coast, as auditor of the bank. [55]

Q. Which bank?

A. All of them, he was accountant for the banks.

Q. You mean for the holding company?

A. That is right.

Q. When did he first become a member of the executive committee, if you recall?

A. That I could not recall.

Q. Who actually managed the affairs and business of the Pacific Empire Holdings, Inc.?

A. Myself and Mr. Arnold, both.

Q. You had a board of directors consisting of how many members? A. Six or seven.

Mr. Scampini: In the interest of time, will it be stipulated that these minute books may be introduced in evidence?

Mr. Naus: Let them be marked for identification and state for the record the portion of them which are considered to be relevant, otherwise these books contain a great deal of immaterial evidence.

Mr. Scampini: I think the books should go in evidence and then each side will be entitled to read into the record the portion which he wishes.

Mr. Naus: I object to the offer of this mass of books in evidence as a whole on the ground that

(Testimony of Michael Maffei.)

they contain a great deal of immaterial evidence. I will make no objection to the books being marked for identification as distinguished from being put in evidence, and then thereafter I will make no objection to the relevant portions that are desired to go into evidence.

The Court: The books may be marked for identification.

Mr. Scampini: It is stipulated that they are the minute books of the corporation, is that right, Mr. Brownstone?

Mr. Brownstone: So stipulated.

(The minute books were marked Plaintiff's Exhibits 2, 3, 4, 5, and 6 for Identification.)

Mr. Scampini: Now, at this time, may it please the Court, I [56] desire to offer in evidence as Plaintiff's Exhibit next in order the articles of incorporation and the by-laws of this company which are found in Volume 1 of the Minute Book, page 1, going to page 44, followed by unnumbered pages entitled, "Certificate of Amendment of Certificate of Incorporation of Associated Calitalo Holdings, Limited, Incorporated," wherein the name was changed to Pacific Empire Holdings, Incorporated. I offer the articles and the by-laws and the amendment. I have here a typewritten copy of these articles and by-laws which was prepared at the time the depositions were taken, of which you have a copy, and I will ask that this be marked as our exhibit next in order. This is a correct copy.

(Testimony of Michael Maffei.)

The Court: Subject to such corrections as may be made. Let it be marked.

(The documents referred to were marked "Plaintiff's Exhibit 7.")

PLAINTIFF'S EXHIBIT No. 7

CERTIFICATE OF INCORPORATION OF ASSOCIATED CALITALO HOLDINGS, LTD., INCORPORATED.

First: That the name of said corporation shall be Associated Calitalo Holdings, Ltd., Incorporated.

Second: Its principal office in the State of Delaware is located at No. 7 West Tenth Street, in the City of Wilmington, County of New Castle. The name and address of its resident agent is the Corporation Trust Company of America, No. 7 West Tenth Street, Wilmington, Delaware.

Third: That the purposes for which said corporation is formed are:

To carry on and transact, in the State of Delaware, the District of Columbia, all other states, territories and colonies of the United States, and in (1*) any and all foreign countries, the following business:

(a) To act as agents for insurance companies, in soliciting and receiving applications for—fire; casualty; plate-glass, boiler, elevator; accident; health, liability; burglary; rent, marine; credit and life

*Page numbering appearing at foot of page of original certificate of incorporation.

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

insurance and all other kinds of insurance; the collecting of premiums and doing such other business as may be delegated to agents and brokers by such companies, and to conduct a general insurance agency and insurance brokerage business.

(b) To act as financial, commercial or general agent or representative of any corporation, association, company, firm, syndicate, individual or others and as such to develop, improve and extend the property, trade and business interests thereof, and to aid in any lawful enterprises in connection with acting as such agent or broker for any principal to give any other aid or assistance; and to act as such agent, representative or broker for any such corporation, association, company, firm, syndicate or individual on commission or salary, or for other lawful consideration, or without consideration for other lawful purpose. (2)

(c) To undertake and carry on any business, undertaking, enterprise, venture, transaction or operation commonly undertaken or carried on by promoters, contractors, merchants, commission men and agents; and in the course thereof to acquire and dispose of, or otherwise turn to account, or realize upon, all or any negotiable or transferable interests and securities, including debentures, bonds, notes, certificates of indebtedness, certificates of interest, and all kinds of commercial paper.

(d) To purchase, or otherwise acquire, become

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

interested in, hold, sell, mortgage, pledge, hypothecate, or otherwise dispose of, or turn to account, or realize upon, all forms of securities including stocks, bonds, debentures, notes, evidences of indebtedness, certificates of indebtedness, certificates of interest, commercial paper, mortgages, and other similar instruments and rights issued or created by corporations, domestic or foreign, associations, companies, firms, trustees, syndicates, individuals, governments, states, municipalities, or other political divisions, issued or created by others, and to deal in and with the same, and to issue in exchange therefor, or in payment thereof, (3) its own stocks, bonds, or other obligations or securities, or otherwise pay therefor; to exercise in respect thereto any and all rights, powers and privileges of individual ownership, or interest therein, including the right to vote thereon and to consent, or otherwise act with respect thereto; to do any and all acts and things for the preservation, protection, improvement and enhancement in value thereof; or in any way design to accomplish any of such results, and to aid by loan, subsidy, guaranty or in any other manner, those issuing, creating or responsible for any of such securities; all to such extent as a corporation organized under the laws of the State of Delaware may then lawfully do.

(e) To acquire or become interested in any such securities as aforesaid by original subscription, un-

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

derwriting, participation in syndicates or otherwise, and irrespective of whether or not such securities be fully paid, or subject to further payments; make payments thereon as called for, or in advance of calls, or otherwise, to underwrite or subscribe for the same, additional or otherwise, and either with a view to investment or for resale, or for any other lawful purpose. (4)

(f) To investigate and report with respect to, and to undertake, carry on, aid, assist or participate in the liquidation or reorganization of financial, commercial, mercantile, manufacturing, industrial, or other business concerns, firms, companies, associations and corporations; and for that purpose to take over the properties, manage the affairs and conduct the business of such concerns, firms, companies, individuals, associations, and corporations; and in the course of such business to acquire and dispose of, or otherwise turn to account all or any negotiable or transferable instruments or securities, including debentures, bonds, notes, certificates of indebtedness, certificates of interest, and all kinds of commercial paper.

(g) To purchase, or otherwise acquire, sell, or otherwise dispose of, realize upon, or otherwise turn to account, manage, liquidate, or reorganize, the properties, assets, business, undertakings, enterprises, or ventures, or any part thereof, of corporations, associations, companies, firms, individuals,

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

syndicates and others, to further and promote the general business interests of any thereof; and to improve, extend and place upon a safe and more (5) permanent foundation, any such business, undertaking, enterprise or venture.

(h) To promote and assist, financially or otherwise, corporations, firms, syndicates, associations, companies, individuals, and others; and to give any guaranty in connection therewith, or otherwise, for the payment of money or performance of any other undertaking or obligation.

(i) To institute, enter into, assist, promote, or participate in commercial, mercantile, industrial works, contracts, undertakings, ventures, enterprises and operations; to endorse or underwrite stock securities or undertakings of any corporation, firm, company, association, individual, syndicate, or others.

(j) To borrow money and for moneys borrowed, or in payment for property acquired, or for any other objects or purposes of the corporation, or otherwise, in connection with the transaction of any part of its business, to execute and issue bonds, debentures, notes and other obligations secured or unsecured; and to mortgage, deed, convey, entrust, pledge or hypothecate any or all of its properties (6) or assets as security herefor; to make, accept, endorse, guarantee, execute and issue notes and other obligations; to mortgage, pledge, or hypothe-

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

cate any stocks, bonds, or evidence of indebtedness, securities, or any other property held by it, or in which it may be interested; and to lend money with or without collateral, or other security.

(k) To guarantee the payment of dividends upon stocks, or the principal, of any or interest upon bonds, notes, or other evidences of indebtedness, or obligations, or the performance of the contracts or other undertakings of any corporation, association, company, firm, syndicate, individual, or others; and to such extent to enter into, make, perform and carry out contracts of every kind for any lawful purpose with any person, firm, syndicate, individual, company, association, corporation, or others.

(l) To manufacture, purchase, buy, sell, own, mortgage, pledge, assign, transfer or otherwise acquire or dispose of, to invest, trade, deal in and with, goods, wares and merchandise and real and personal property of every class and description.

(7)

(m) To acquire and pay for in cash, stock, or bonds, of this corporation, or otherwise, the goodwill, rights, assets and property, and to undertake or assume the whole or any part of the obligations or liabilities of any person, firm, syndicate, association, company, or corporation.

(n) To buy, sell, hold, use, assign, lease, grant licenses in respect of, mortgage, hypothecate, or otherwise acquire or dispose of letters patent of the

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

United States, or any foreign country, patent rights, licenses and privileges, inventions, improvements and processes, copyrights, trade-marks and trade names, relating to, or useful in connection with, any business of this corporation, or in which it may have any interest.

(o) To issue bonds, debentures, or obligations, of this corporation from time to time for any of the objects or purposes of the corporation, and to secure the same by mortgage, pledge, deed of trust, or otherwise.

(p) To purchase, hold, sell, pledge, hypothecate or otherwise acquire or dispose of the shares of its own capital stock; provided it shall (8) not use its funds or property for the purchase of its own shares of capital stock, when such use would cause impairment of its capital; and provided further that shares of its own capital stock belonging to it shall not be voted upon directly or indirectly.

(q) To have one or more offices, to carry on all or any of the operations and business; and without restrictions or limit as to amount, to purchase, or otherwise acquire, hold, own, mortgage, sell, convey, or otherwise dispose of real and personal property of every class and description in any of the states, districts, territories or colonies of the United States, and in any and all foreign countries, subject to the laws of such state, district, territory, colony or country.

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

(1) To lend money and to take security for the payment thereof, and in general to be, perform, and carry out all lawful business, acts and things as shall be necessary, proper or convenient for the purpose of expediting and carrying on, conducting, managing and controlling the business and purpose of this corporation. (9)

Fourth: That the time for which such corporation is to exist is unlimited and said corporation shall have perpetual existence.

Fifth: That the capital stock of said corporation shall consist of five million (5,000,000) shares without par value.

Sixth: This corporation shall commence business with one thousand dollars (\$1,000.00).

Seventh: The names and places of residence of each of the original incorporators are as follows:

Name	Residence
L. E. Gray.....	Wilmington, Delaware
H. H. Snow.....	Wilmington, Delaware
L. H. Herman.....	Wilmington, Delaware

Eighth: The private property of the stockholders shall not be subject to the payment of corporate debts to any extent whatever.

Ninth: That said corporation shall not be bound to offer to its shareholders or stockholders any priority or preemptive right to subscribe for or to purchase its shares as presently divided or as here-

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

after divided by amendment hereto, or otherwise.

Tenth: Whenever a compromise or arrangement is proposed between this corporation and its creditors or any class of them and/or between this corporation and its stockholders or any class of them, any court of equitable jurisdiction within the State of Delaware may, on the application in a summary way of this corporation or of any creditor or stockholder thereof, or on the application of any receiver or receivers appointed for this corporation under the provisions of Section 3883 of the Revised Code of 1915 of said State, or on the application of trustees in dissolution or of any receiver or receivers appointed for this corporation under the provisions of Section 43 of this Chapter, order a meeting of the creditors or class of creditors, and/or of the stockholders or class of stockholders of this corporation, as the case may be, to be summoned in such manner as the said Court directs. If a majority in number representing three-fourths in value of the creditors or class of creditors, and/or of the stockholders or class of stockholders of this corporation, as the case may be, agree to any compromise or arrangement and to any reorganization of this corporation as consequence of such compromise or arrangement, the said compromise or arrangement and the said organization (11) shall, if sanctioned by the Court to which the said application has been made, be binding on all the creditors or class of

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

creditors, and/or on all the stockholders or class of stockholders, of this corporation, as the case may be, and also on this corporation.

Eleventh: The number of directors of the corporation shall be fixed and may be altered from time to time as may be provided in the by-laws. In case of any increase in the number of directors, the additional directors may be elected by the directors or by the stockholders at an annual or special meeting, as shall be provided in the by-laws.

The directors from time to time may determine at what times and places the accounts and books of the company (other than the stock ledger), shall be open to the inspection of the stockholders; and no stockholder shall have any right to inspect any account or book or document of the company, unless expressly so authorized by statute or by a resolution of the stockholders or the directors.

The directors in their discretion may submit any contract or act for approval or ratification at any annual meeting of the stockholders or at any (12) meeting of the stockholders called for the purpose of considering any such act or contract, and any contract or act that shall be approved or be ratified by the vote of the holders of a majority of the capital stock of the company which is represented in person or by proxy at such meeting (provided that a lawful quorum of stockholders be there represented in person or by proxy) shall be as valid

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

and as binding upon the corporation and upon all the stockholders, as though it had been approved or ratified by every stockholder of the corporation, whether or not the contract or act would otherwise be open to legal attack because of directors' interest, or for any other reason.

The directors shall also have power without the assent or vote of the stockholders to make and alter by-laws of the corporation, to fix the times for the declaration and payment of dividends; to fix and vary the amount to be reserved as working capital; to authorize or cause to be executed mortgages and liens upon all the property of the corporation, or any part thereof.

The directors shall also have power, with the consent in writing of a majority of the holders (13) of the voting stock issued and outstanding, or upon the affirmative vote of the holders of a majority of the stock issued and outstanding having voting power, to sell, lease or exchange all of its property and assets, including its good-will and its corporate franchises, upon such terms and conditions as the board of directors deem expedient and for the best interests of the corporation; to determine the use and disposition of any surplus or net profits over and above the capital stock paid in, and in their discretion the directors may use and apply any such surplus or accumulated profits in purchasing or acquiring the bonds or other obligations or shares

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

of capital stock of the corporation, to such extent and in such manner and upon such terms as the directors shall deem expedient; but shares of such capital stock so purchased or acquired may be resold unless such shares shall have been retired for the purpose of decreasing the corporation's capital stock as provided by law.

In addition to the powers and authorities hereinbefore or by statute expressly conferred upon them, the directors are hereby empowered to exercise (14) all such powers and do all such acts and things as may be exercised or done by the corporation; subject, nevertheless, to the provisions of the statutes of Delaware, of this certificate, and to any by-laws from time to time made by the stockholders; provided, however, that no by-laws so made shall invalidate any prior act of the directors which would have been valid if such by-laws had not been made.

Both stockholders and directors shall have power, if the by-laws so provide, to hold their meetings, and to have one or more offices within or without the State of Delaware, and to keep the books of the corporation (subject to the provisions of the statutes), outside of the State of Delaware, at such places as may be from time to time designated by the board of directors.

Twelfth: In all elections, stockholders entitled to vote shall have and are hereby expressly granted the right to cumulate the votes and to vote all or

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

any part of the entire votes to which they are entitled for any one or more of the entire number of candidates. (15)

We, the undersigned, being each of the incorporators hereinbefore named for the purpose of forming a corporation to do business both within and without the State of Delaware, and in pursuance of the General Corporation Law of the State of Delaware, being Chapter 65 of the Revised Code of Delaware, and the acts amendatory thereof and supplemental thereto, do make this certificate, hereby declaring and certifying that the facts herein stated are true, and accordingly have hereunto set our hands and seals this 6th day of January, A. D. 1930.

L. E. GRAY (Seal)

H. H. SNOW (Seal)

L. H. HERMAN (Seal)

In presence of:

ALBERT L. MILLER (16)

State of Delaware,
County of New Castle—ss.

Be it remembered, that on this 6th day of January, A. D. 1930, personally came before me, Albert L. Miller, a Notary Public for the State of Delaware, L. E. Gray, H. H. Snow and L. H. Herman all of the parties to the foregoing Certificate of Incorporation, known to me personally to be such,

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

and severally acknowledged the said certificate to be the act and deed of the signers respectively and that the facts therein stated are truly set forth.

Given under my hand and seal of office the day and year aforesaid.

ALBERT L. MILLER

Notary Public

(Albert L. Miller, Notary Public. Appointed Aug. 31, 1929. Term 2 years. Delaware.) (17)

STATE OF DELAWARE

OFFICE OF SECRETARY OF STATE

I, Charles H. Grantland, Secretary of State of the State of Delaware, do hereby certify that the above and foregoing is a true and correct copy of Certificate of Incorporation of the "Associated Cal-italo Holdings, Ltd., Incorporated", as received and filed in this office the seventh day of January, A. D. 1930, at 9 o'clock A. M.

In Testimony Whereof, I have hereunto set my hand and official seal, at Dover, this seventh day of January in the year of our Lord one thousand nine hundred and thirty.

CHARLES H. GRANTLAND

Secretary of State

(Secretary's Office. 1911. 1855 Delaware 1793)

(18)

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

RECEIVED FOR RECORD
JANUARY 7TH, A. D. 1930
ALBERT STETSER, RECORDER

State of Delaware,
New Castle County—ss.

Recorded in the Recorder's Office at Wilmington,
in Certificate of Incorporation, Record Q, Vol. 34,
Page 133 &c., the 7th day of January, A. D. 1930.

Witness my hand and official seal.

ALBERT STETSER
Recorder

(Recorder's Office, New Castle Co., Del. Mercy—
Justice) (19)

AMENDMENTS TO ARTICLES OF
INCORPORATION
of
ASSOCIATED CALITALO HOLDINGS, LTD.
INCORPORATED

Article Fifth

February 26th, 1932

March 21st, 1932

"That the total number of shares of stock which
said corporation shall have authority to issue is
five million (5,000,000) shares of capital stock, all
having a par value of ten cents (10¢) per share."

(20)

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

BY-LAWS
of
ASSOCIATED CALITALO HOLDINGS, LTD.,
INCORPORATED

ARTICLE I—CORPORATE NAME

The name of the corporation for whom the following by-laws are hereinafter certified and adopted is as prescribed in the articles of incorporation thereof: Associated Calitalo Holdings, Ltd., Incorporated.

ARTICLE II—CORPORATE SEAL

The company shall have a corporate seal consisting of a circle having on its circumference the words, "Associated Calitalo Holdings, Ltd., Incorporated," the year of its organization, and the words, "Corporate Seal Delaware."

ARTICLE III—CORPORATE POWERS

The corporate powers of this corporation shall be such as are prescribed by the articles of incorporation hereof. (21)

ARTICLE IV—DIRECTORS

Section 1—Election

The directors shall not be less than fifteen (15) nor more than twenty-five (25) in number and shall be elected by ballot at the annual meeting of the stockholders.

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

Section 2—Term of Office

Directors shall hold office for one year and until their successors are elected or appointed. Their term of office shall begin immediately after election.

Section 3—Qualifications

Every director must be the owner of stock of this corporation standing in his own name on the books of the corporation.

Section 4—Vacancies

A vacancy shall be deemed to exist in the board of directors only whenever any director ceases to act as such by reason of his death, removal, or resignation duly accepted, or when any director is (22) adjudicated an incompetent person or *in* insane person, or ceases to be the owner of any stock in this corporation, or in case the shareholders shall increase the authorized number of directors and shall fail for a period of thirty (30) days from the effective date of such increase to elect the additional directors so provided for, or in case the shareholders fail at any time to elect the full number of authorized directors.

Section 5—Resignation

No resignation of a director shall take effect so long as such resignation would reduce the number of directors to a number less than necessary to form a quorum of said board unless the remaining members of said board shall have first accepted the res-

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

ignation of a director proposing to resign under such circumstances.

Section 6—Appointment

Vacancies in the board of directors shall be filled by an appointee of the board who shall hold office until his successor is elected at the next annual meeting of the shareholders, or at any special meeting duly called for that purpose prior thereto. (23)

Section 7—Compensation

The compensation of each director for attendance at directors' meetings shall be fixed by the stockholders.

ARTICLE IV—POWERS OF DIRECTORS

Section 1—General Management

The board of directors shall have vested in it all the corporate powers of this corporation with the right to conduct, manage and control the business of the corporation and to make for it rules and regulations not inconsistent with the laws of the State of Delaware or the by-laws of the corporation for the guidance of the officers and management of the affairs of the corporation. The board of directors shall have full power and authority to do and perform and cause to be done and performed any and every act which the corporation may lawfully do and perform, including the matters hereinafter set forth in this article.

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

Section 2—Delegation of Management

The directors shall have the power to elect (24) or choose all officers and agents, attorneys in fact, servants and employees of the corporation and may remove any of them except a director and prescribe such duties for each of them as are not inconsistent with the laws or these by-laws, and fix their compensation and require from them security for faithful performance, if deemed necessary. The directors shall also have the power to appoint an executive committee to transact the business of the corporation as hereinafter set forth.

Section 3—Vacancies

The board of directors, as at any time constituted, shall have the power to appoint persons to act as directors for the purpose of filling any vacancy created in said board.

Section 4—Incurrance of Debt

The board of directors shall have full power and authority to borrow money on behalf of the company, including the power and authority to borrow money from any of the shareholders, directors or officers of the company and otherwise to incur indebtedness on behalf of the company; to authorize (25) the execution of promissory notes or other evidences of indebtedness of the company and to agree to pay interest thereon; to sell, convey, alienate, transfer, assign, exchange, pledge, hypothecate

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

or otherwise encumber the property, real and personal, and the franchises of the company to purchase, sell, lease and otherwise acquire property, real and personal, on behalf of the company.

ARTICLE V—MEETINGS OF DIRECTORS

Section 1—Regular Meetings

Regular meetings of the directors shall be held on the 15th day of each and every month at the hour of 10 A. M. thereof for the transaction of the business of the company. If said day should be a legal holiday, such meeting shall be held at the same hour on the next succeeding day which is not a legal holiday.

Section 2—Dispensation of Notice

Notice of all regular meetings of the board of directors is dispensed with.

Section 3—Special Meetings

Special meetings of the board of directors (26) may be called any time by the president or two of the directors and notice shall be given of such called meetings by leaving a written or printed notice at the last known place of business or residence of each director at least five (5) days prior to any such meeting. For the purposes of this section, each director must at the first meeting after his election cause to be entered in the minutes the address to which all notices of such meeting of the board of directors may be directed until a similar notice and

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

entry of change of residence has by him been given in writing.

Section 4—Quorum

A majority of the full membership of the board of directors in office shall constitute a quorum at any regular or special meeting thereof for the transaction of business; provided, however, that for the purpose of filling a vacancy on the board of directors, in the event that vacancies therein have been created constituting a majority of said board or more, then, for that purpose, a quorum shall consist of all the remaining members of said board, provided that less than a majority shall constitute a quorum (27) for the purpose of adjourning any meeting to any later time, without notice, until a quorum shall attend.

ARTICLE VI—DUTIES OF DIRECTORS

Section 1—Officers

It shall be the duty of the board of directors to elect the officers hereinafter provided in these by-laws.

Section 2—Records of Proceedings

The board of directors shall cause to be kept a written record of all its meetings and acts and of the proceedings of the stockholders.

Section 3—Annual Report

The board of directors shall cause to be printed and presented at the regular annual meeting of the

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

stockholders a report in writing showing in detail the assets and liabilities of the corporation and the general condition of its affairs. A similar statement shall be printed by the board of directors and presented at any meeting of the stockholders when required by persons holding at (28) least fifty per cent (50%) of the outstanding shares of the corporation.

Section 4—Dividends

The directors shall declare dividends out of the surplus profits of the corporation, if any, when such profits shall in the opinion of the directors warrant such declaration.

Section 5—Supervision

The board of directors shall supervise all officers, agents and employees and see that their duties are properly performed.

Section 6—Management

The board of directors shall manage and control the business of the corporation.

Section 7—General Duties

The board of directors shall do and perform all acts required by law to be by them kept and performed, or to be by this corporation kept or performed. (29)

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

ARTICLE VII—EXECUTIVE COMMITTEE

Section 1—Appointment

The directors may appoint an executive committee from their own number to consist of such number as they shall see fit.

Section 2—Powers

Any executive committee appointed by the board of directors shall have authority to exercise all the powers of the board of directors when said board is not in session, but subject to the immediate disaffirmance by the board at its next meeting after receiving the report of the acts done by said committee. Such committee may act by the written consent of all its members although not formally convened.

Section 3—Removal

Members of this committee may be removed as such and their successors may be appointed by the board and said committee may be abolished at any time by the board of directors. (30)

ARTICLE VIII—OFFICERS

The officers of this corporation shall be a president, one or more vice-presidents, each of whom shall be a member of the board of directors, a secretary, a treasurer, and such other officers as the board may by resolution create. The compensation and tenure of office of all officers other than direc-

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

tors shall be fixed by the board of directors. All officers shall be elected by the board of directors and may be removed by said board at any time, either with or without cause.

ARTICLE IX—PRESIDENT

Section 1—Nature of Office

The president shall be the chief executive officer and head of the corporation and shall have general control and management of its business and affairs subject to the control of the board of directors.

Section 2—Duties

The president shall sign all certificates of stock and all conveyances of real property executed in behalf of the corporation and all papers, con- (32) tracts and documents required by the board of directors or proper and necessary to carry on the business of the corporation.

He shall preside at all meetings of the directors and stockholders.

All the powers and duties imposed upon him by law or these by-laws may be exercised by him either within or without the State of Delaware.

ARTICLE X—VICE-PRESIDENTS

The vice-president in the absence or inability to act of the president is vested with all the powers and shall perform all the duties of the president. If there be more than one vice-president, they

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

shall be numbered and each shall act in the absence or inability to act of the president and of all vice-presidents preceding him in number. In such acts and in the execution of writings by such vice-presidents, it shall not be necessary to recite the absence or inability of any preceding officer to act.

ARTICLE XI—SECRETARY

Section 1—Nature of Office

The secretary shall be ex-officio, secretary (33) and clerk of the board of directors and secretary of all stockholders' meetings and of the executive and of all other committees. He shall attend to all their sessions and shall record all votes and minutes of their proceedings in a book or books kept for that purpose.

Section 2—Notices

He shall give or serve all notices required by law or the order of the president and all notices required of all meetings of the stockholders, directors and committees when not otherwise legally given. In case of his absence, inability, refusal or neglect so to do, then such notices may be given or served by any person thereunto directed by the president.

Section 3—Certificates of Stock

He shall keep a book of blank certificates of stock, and shall fill out and countersign all certificates of stock issued, and make entries evidencing such issuance on the margin of said book. (34)

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

Section 4—Corporate Seal

He shall keep the corporate seal and he shall affix said seal to all papers requiring the affixation thereof, including certificates of stock.

Section 5—Transfer Book

He shall keep a transfer book and a stock ledger in debit and credit form showing the number of shares issued to and transferred by any stockholder and the dates of such issuance and transfer.

Section 6—Account Books

He shall keep proper account books, in debit and credit form, of all moneys received by or paid out by the corporation. He shall as often as required by the president make and file in the office of the company a trial balance sheet and shall as often as required make and file in the office of the company a balance sheet showing profits and losses of the company as appear by its books.

Section 7—General Duties

He shall in general perform all other duties (35) required by the president, directors or committees.

ARTICLE XII—TREASURER

The treasurer may be a bank or trust company to be appointed by the board of directors at their discretion, or may be the same person selected to act as secretary of the corporation. The treasurer shall safely keep all moneys of the corporation, deposit-

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

ing the same from time to time in such bank or banks as may be designated by the board of directors. The treasurer shall from time to time pay out the funds of the corporation upon checks or drafts signed by such person or persons and in such manner as shall from time to time be determined by the board of directors.

ARTICLE XIII—SHARES OF STOCK

Section 1—Certificates

Certificates of stock shall be of such form and device as the board of directors may direct and each certificate shall be signed by the president and countersigned by the secretary and express on its face its number, date of issuance, the number of shares for which, and the person to whom it is issued. All certificates of stock shall be registered (36) with some person, firm, or corporation selected by the board of directors.

Section 2—Transfer

Shares of the corporation may be transferred at any time by the holders thereof, or by attorney legally constituted, or by their legal representatives, by endorsement on the certificate of stock, but no transfer shall be valid until the surrender of the certificate to be transferred and a receipt is given by the secretary, or any transfer agent hereafter appointed by the board of directors.

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

The surrendered certificate shall be cancelled before a new one is issued in lieu thereof, and the secretary shall preserve the certificate so cancelled as a voucher. If, however, a certificate is lost or destroyed, the board of directors may order a new certificate issued as is by law required or permitted.

ARTICLE XIV

MEETINGS OF STOCKHOLDERS

Section 1—Annual Meeting

The annual meeting of stockholders shall be held on the 15th day of February in each year at the hour of 10 o'clock in the forenoon of said day; (37) provided, however, that if said day should be a legal holiday, such meeting shall be held at the same hour on the next succeeding day which is not a legal holiday.

At such annual meeting, the directors for the ensuing year shall be elected.

Section 2—Dispensation of Notice

Notice of all regular meetings of stockholders is dispensed with. No notice of an annual meeting or of the election to be held thereat need be given and the same is hereby dispensed with.

Section 3—Special Meetings

Special meetings of the stockholders may be called at any time by the president, or by two (2) of the directors, or by the holders of not less than one-

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

third ($\frac{1}{3}$) of the shares of stock of the company at any time outstanding, and all such calls shall state the purpose of the meeting and such meetings shall have no power to do any business not stated in the call therefor.

Section 4—Notice of Special Meetings

Notice of the day, hour and place of all (38) special meetings of stockholders shall be given by the parties making the call causing notice thereof to be published in one or more newspapers of general circulation published in the City and County of San Francisco, State of California, for at least three (3) days last preceding the day of meeting, or by a notice in writing signed by the president and delivered to each stockholder either personally or by mail to his registered or last known business or residence address; provided, however, that such written notice when mailed shall be deposited in the United States mails, postage prepaid, at least five (5) days before the day appointed for such meeting.

Section 5—Registration of Address

Each stockholder may register his address with the corporation by written notice thereof delivered by him to the secretary of the corporation.

Section 6—Quorum

For the purpose of the transaction of business, a quorum of any regular or special meeting of the stockholders shall consist of the holders of a ma-

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

jority of the stock of this corporation then out- (39)
standing, either present in person or by proxy. In
the event a quorum be not present at any meeting
either general or special, the persons then and there
present, either in person or by proxy, may adjourn
the same from day to day without further notice,
until a quorum shall be present at which time all
business which might at the original meeting have
come before the same may be transacted.

Section 7—Voting

At all corporate meetings, each stockholder shall
have the right to vote either in person or by proxy
the number of shares standing in his name.

Section 8—Proxies

All proxies shall be in writing and filed with the
secretary. If a proxy shall authorize the holder
thereof to vote thereon at any meeting, it shall be
sufficient authority for the holder thereof to vote
thereon at any adjournment of such meeting.

ARTICLE XV—BOOKS AND PAPERS

The books and such papers as may be placed (40)
on file by vote of the stockholders or directors shall
at all times in business hours be subject to the in-
spection of the board of directors or of any stock-
holder.

ARTICLE XVI—AMENDMENTS

These by-laws may be repealed, altered or
amended, or new by-laws may be adopted at the

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

annual or any other meeting of the stockholders by a vote representing two-thirds ($\frac{2}{3}$) of the subscribed capital stock; or the by-laws may be repealed, altered or amended or new by-laws may be adopted by the board of directors of the company from time to time as to said board of directors shall seem fit and proper. (41)

AMENDMENTS TO BY-LAWS OF ASSOCIATED CALITALO HOLDINGS LTD. INCORPORATED.

Article 4, Section 1, Feb 16 1931

“The directors shall not be less than Five (5) nor more than Twenty-one (21) in number and shall be elected by ballot at the annual meeting of the stockholders.

The President of the Corporation may at his discretion appoint an advisory board to consist of not less than Five (5) nor more than twenty-five (25) members, to assist the board of directors, such appointment to be subject to the approval of the Board of Directors. The advisory board is to serve until their successors are appointed or until the termination of office of the Board of Directors whom they are appointed to assist.”

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

Article 1, Section (a) Feb 15th, 1932, Wilmington
Del.

“Location of offices.

The principal office of the corporation shall be in the City of Wilmington, County of New Castle, State of Delaware, and the name of the resident agent in charge thereof is The Corporation Trust Company.

The Corporation may also have an office in the City and County of San Francisco, State of California, and also offices at such other place or places as the Board of Directors may from time to time appoint, or the business of the Corporation may require.”

Article 5, Section 1, Feb 15th, 1932, Wilmington,
Del.

“Regular meetings of the Board of Directors may be held at such place within or without the State of Delaware as shall from time to time be determined by the Board.”

Article 5, Section 3, Feb 15th, 1932, Wilmington
Del

“Special meetings of the Board of Directors may be held within or without the State of Delaware at such place as indicated in the notice or waiver or notice thereof.”

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

Article 14, Section 3, Feb 15th, 1932, Wilmington,
Del

“Regular meetings of stockholders and all meetings of stockholders for the election of Directors shall be held at the office of the corporation in the City and County of San Francisco, State of California.” (42)

Article 14, Section 4, Feb 15th, 1932 Wilmington
Del.

“Special meetings of stockholders other than for the election of Directors may be held within or without the State of Delaware at such place as is indicated in the notice or waiver of notice thereof.”

Article 4, Section 1, Feb 26th, 1932.

“The property and business of this corporation shall be managed and controlled by its board of directors fifteen (15) in number who shall be elected by the stockholders except as otherwise provided in these by-laws.

The Board of Directors may at any time, by amendment of these by-laws, increase or decrease the number of its members and may elect such additional directors, if the number is increased, who shall hold office until the next annual meeting of the stockholders and until their successors are elected and qualified.”

Article 5, Section 1, Feb 26, 1932.

“Regular meetings of the Directors shall be held quarterly on the 15th day of January, April, July

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

and October at the hour of 10 o'clock A. M. thereof for the transaction of the business of the company, if said day should be a legal holiday, such meetings shall be held at the same hour on the next succeeding day which is not a legal holiday."

Article 16, Section 4, Feb 26, 1932.

"Notice of the day, hour and place of all special meetings of stockholders shall be given to each stockholder entitled to vote at such meeting, (1) by publishing a copy of such notice once in one or more newspapers of general circulation published in the City and County of San Francisco, and said publication shall be made on a day not more than thirty (30) days, nor less than three (3) days before the day of such meeting, or (2) by depositing a copy of such notice in the United States mail, postage prepaid, to his address appearing on the stock ledger of the corporation on a day not more than thirty (30) days, nor less than three (3) days before the day of such meeting. If the address of any stockholder does not appear on the stock ledger of the corporation, notice shall be deemed to have been given him of such notice if so deposited in the United States mail, addressed (43) to his last known post office address or to San Francisco, California.

Where the Statutes of the State of Delaware require a notice of a definite number of days to be given to stockholders, for any meeting of stock-

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

holders, such notice shall be deemed to have been given in accordance with such provision of statute if said publication is so made or such notice is so mailed the number of days required by such statute before the date of such meeting.

Article 14, Section 3, Jan. 14, 1933.

“Regular meetings of stockholders and all meetings of stockholders for the election of Directors shall be held at either the office of the corporation in the City and County of San Francisco, State of California, or at the principal office of the corporation in the City of Wilmington, County of New Castle, State of Delaware.”

Article 4, Section 1, Jan 14, 1933.

“The property and business of this corporation shall be managed and controlled by its Board of Directors seven (7) in number who shall be elected by the stockholders except as otherwise provided in these By-laws.

The Board of Directors may at any time, by amendment of these By-laws, increase or decrease the number of its members and may elect such additional Directors, if the number is increased, who shall hold office until the next annual meeting of the stockholders and until their successors are elected and qualified.”

Article 14, Section 3, July 15, 1936

“Regular meetings of the stockholders, and all meetings of stockholders for the election of Direc-

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

tors, shall be held at the office of the corporation, in the City of Wilmington, County of New Castle, State of Delaware.” (44)

CERTIFICATE OF AMENDMENT OF CERTIFICATE OF INCORPORATION OF ASSOCIATED CALITALO HOLDINGS, LTD., INCORPORATED.

Associated Calitalo Holdings, Ltd., Incorporated, a corporation organized and existing under and by virtue of the provisions of an Act of the General Assembly of the State of Delaware, entitled “An Act Providing a General Corporation Law”, approved March 10, 1899, and the acts amendatory thereof and supplemental thereto, the certificate of incorporation of which was filed in the office of the Secretary of the State of Delaware on January 7, 1930, and recorded in the office of the Recorder of Deeds for New Castle County, State of Delaware, on January 7, 1930, Does Hereby Certify:

First: That at a meeting of the Board of Directors of said Associated Calitalo Holdings, Ltd., Incorporated, duly held and convened, a resolution was duly adopted setting forth an amendment proposed to the certificate of incorporation of said corporation as follows:

“Be It Resolved that the certificate of incorporation of said Associated Calitalo Holdings, Ltd., Incorporated be amended by striking out the con-

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

tents of Article First and by inserting in lieu thereof the following:

‘That the name of said corporation shall be Pacific Empire Holdings, Incorporated’,

and declaring said amendment advisable and further declaring and resolving that said amendment be submitted, for ratification, to the stockholders of said corporation at the annual meeting of the stockholders of said corporation to be held on Thursday, the 15th day of February, 1934;

Second: That thereafter, and on Thursday, the 15th day of February, 1934, pursuant to the aforesaid resolution of its Board of Directors, and pursuant to the by-laws of the corporation setting and fixing Thursday, the 15th day of February, 1934, at the hour of ten o'clock A. M. of said day, at the office of the Company in the City and County of San Francisco, State of California, as the time and place for the holding of the annual meeting of the stockholders of said corporation, the annual meeting of said corporation was duly held; that at said annual meeting held as aforesaid more than a majority of the voting stockholders of said corporation were present in person or by proxy; that at said meeting a vote of the stockholders by ballot, in person or by proxy, was taken for and against said proposed amendment, which vote was conducted by F. E. Helwick and H. R. Bardwell, two Judges

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

appointed for that purpose by said meeting; and that at said meeting, by vote conducted as aforesaid, said amendment was adopted pursuant to Section 26 of the General Corporation Law of Delaware as amended, the persons or bodies corporate holding the majority of the issued and outstanding voting stock of said corporation voting for said proposed amendment, to-wit, 1,368,914 shares of common stock were voted for said amendment out of the total shares outstanding of 2,537,699 shares of common stock, and entitled to vote, the said shares being the only stock of the company issued and outstanding and entitled to vote, all as appears by the duplicate certificate made by said Judges, one of which is hereto attached marked "A" and made a part hereof.

In Witness Whereof, Said Associated Calitalo Holdings, Ltd., Incorporated has caused its corporation seal to be hereunto affixed and this certificate to be signed by M. Maffei, its President, and L. R. Arnold, its Secretary, this 1st day of May, 1934.

ASSOCIATED CALITALO HOLDINGS,
LTD., INCORPORATED

[Seal]

By M. MAFFEI (Signed)

President

By L. R. ARNOLD (Signed)

Secretary

[Endorsed]: Filed 4-20-43.

(Testimony of Michael Maffei.)

Mr. Scampini: I now ask leave to read into the record one paragraph of one of the articles, and two or three paragraphs from the by-laws, if I may.

The Court: Proceed.

Mr. Scampini: Paragraph XI of the Articles of Incorporation reads as follows (reading).

Reading from the by-laws, I desire to read at this time the following applicable portions. Section 1 of the by-laws found on page 22 of the minute book, Volume 1 deals with vacancies, term of office of the board of directors, and the section reads as follows, Article IV. Directors, election, term of office vacancies. I will read Section 4 (reading).

Now, Article IV of the by-laws dealing with the powers of directors on page 24, Section 1, reads as follows (reading). [57]

On page 29 we have a section dealing with management reading as follows (reading). Also, "General duties" (reading).

The next section I desire to read into the record is the section dealing with the executive committee, Article VII, Section 1, "Appointment and powers" (reading).

The Court: We will take a recess until 2:00 o'clock.

(A recess was here taken until 2:00 o'clock p.m.)

[58]

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

appointed for that purpose by said meeting; and that at said meeting, by vote conducted as aforesaid, said amendment was adopted pursuant to Section 26 of the General Corporation Law of Delaware as amended, the persons or bodies corporate holding the majority of the issued and outstanding voting stock of said corporation voting for said proposed amendment, to-wit, 1,368,914 shares of common stock were voted for said amendment out of the total shares outstanding of 2,537,699 shares of common stock, and entitled to vote, the said shares being the only stock of the company issued and outstanding and entitled to vote, all as appears by the duplicate certificate made by said Judges, one of which is hereto attached marked "A" and made a part hereof.

In Witness Whereof, Said Associated Calitalo Holdings, Ltd., Incorporated has caused its corporation seal to be hereunto affixed and this certificate to be signed by M. Maffei, its President, and L. R. Arnold, its Secretary, this 1st day of May, 1934.

ASSOCIATED CALITALO HOLDINGS,
LTD., INCORPORATED

[Seal]

By M. MAFFEI (Signed)

President

By L. R. ARNOLD (Signed)

Secretary

[Endorsed]: Filed 4-20-43.

(Testimony of Michael Maffei.)

Mr. Scampini: I now ask leave to read into the record one paragraph of one of the articles, and two or three paragraphs from the by-laws, if I may.

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The Court: We will take a recess until 2:00 o'clock.

(A recess was here taken until 2:00 o'clock p.m.)

[58]

(Testimony of Michael Maffei.)

Afternoon Session

April 20, 1943—2:00 o'clock P. M.

MICHAEL MAFFEI,

recalled:

Direct Examination

(resumed)

Mr. Scampini: I will read now into the record from page 32 of Volume 1, dealing with the powers of the president, Section 1 (reading).

On page 33 of the by-laws, dealing with the powers of the vice-president, Article X (reading).

Q. Now, Mr. Maffei, on or about January 8, 1941, in the Pacific Empire Holdings, Incorporated, was there a president functioning?

A. There was.

Q. That was you? A. That is right.

Q. How many vice-presidents did you have functioning?

A. I think Mr. Arnold was vice-president.

Q. Wasn't Mr. Bercut also second vice-president? A. Yes.

Q. Was there a secretary? A. Yes.

Q. Who was the secretary, do you recall?

A. I think it was Mr. Arnold.

Q. The minute book will so indicate and we will come to it. Now, dealing with the power of the

(Testimony of Michael Maffei.)

secretary, Article XI., Section 1: "Nature of Office" (reading).

On page 42 of Volume 1, Article V., Section 1 of by-laws was amended on February 15, 1932 so as to provide that "Regular meetings of the Board of Directors may be held at such place within or without the State of Delaware as shall from time to time be determined by the board."

"Special meetings of the Board of Directors may be held within or without the State of Delaware at such place as is indicated in the notice or waiver or notice thereof." [59]

Article XIV., Section 3 was amended February 15, 1932 so as to provide that "Regular meetings of stockholders and all meetings of stockholders for the election of directors shall be held at the office of the corporation in the City and County of San Francisco, State of California."

On page 43 of the minute book we find that Article IV., Section 1 of the by-laws was amended again to provide that "The property and business of this corporation shall be managed and controlled by its board of directors, fifteen in number, who shall be elected by the stockholders, except as otherwise provided in these by-laws."

"The board of directors may at any time by amendment of these by-laws, increase or decrease the number of its members and may elect such additional directors, if the number is increased, who shall hold office until the next annual meeting of the

(Testimony of Michael Maffei.)

stockholders and until their successors are elected and qualified."

On page 44 we have a further amendment to Article IV. that "The property and business of this corporation shall be managed and controlled by its board of directors, seven in number, who shall be elected by the stockholders except as otherwise provided in these by-laws."

Q. I will ask you, Mr. Maffei, do you recall any further amendment of the by-laws providing the number shall consist of seven directors?

A. I do not.

Q. You stated this morning that one of the predecessor companies of Pacific Empire Holdings, Inc., formerly known as Associated Calitalo Holdings, Limited, was the Brotherhood Investment Corporation, is that right? A. That is right.

Q. In fact, the Brotherhood Investment Company was the owner of [60] and founder of the City National Bank of San Francisco?

A. That is right.

Q. Did the Brotherhood Investment Corporation have a substantial number of stockholders, Mr. Maffei, to your knowledge?

A. I could not tell exactly, but they did have.

Q. Will you please state who incorporated and how the Brotherhood Investment Corporation came into existence, if you know?

Mr. Naus: One moment: I object to it as calling for an opinion and conclusion unless this witness

(Testimony of Michael Maffei.)

participated. There is no foundation laid.

The Court: I will sustain the objection on the ground that no foundation has been laid.

Mr. Scampini: Were you one of the officers or directors of the Brotherhood Investment Corporation?
A. I was not.

Q. Do you know who the principal and main stockholders were, Mr. Maffei?

A. I could not tell you now, no.

Q. Now, you testified this morning in answer to one of my questions, if I understood you correctly, and if not will you correct me, that on or about 1931 the Associated Calitalo Holdings Corporation purchased a substantial amount of stock of Merchants Ice & Cold Storage Company from Frederic Vincent, William A. Sherman, George A. Stratton, and Joseph McInerney, is that right?
A. Yes.

Q. Were you a director of the company at that time, Mr. Maffei?

A. Of the holding company?

Q. Of the Associated Calitalo Holdings, Limited, Incorporated?
A. I was.

Q. On pages 3 to 15 inclusive of Volume 2 of the minute book there is purported to be a special meeting of the board of directors of Associated Calitalo Holdings, Limited, Incorporated, called [61] for the purpose of approving the execution of a contract dated May 16, 1931 by and between Associated Calitalo Holdings, Limited, Incorporated, a Delaware corporation, first party, Joseph L. McIn-

(Testimony of Michael Maffei.)

erney, a resident of San Francisco, second party, William A. Sherman, resident of San Francisco, third party, and George Stratton and Frederic Vincent, fourth parties, and ask you to look at that contract, which is found on pages 9 to 15, inclusive, of Volume 2, and state whether or not that is a true copy of the agreement under which these shares were purchased from these parties.

Mr. Naus: Objected to as calling for secondary evidence of a writing. The original contract compared with that will tell whether or not that is a true copy.

Mr. Scampini: That is part of the minutes, that the directors authorized the execution.

The Court: Is the original available?

Mr. Scampini: I have not been able to locate the original.

The Court: Where is the original?

Mr. Naus: I have not the slightest idea.

Mr. Scampini: I am just trying to show and offer in evidence a meeting of the board of directors called for the purpose of authorizing the execution of this contract—

The Court: Is the contract recited in the minutes?

Mr. Scampini: Yes, in haec verba.

Mr. Naus: I make no objection to that, because I have already agreed to it.

A. That is correct.

Mr. Scampini: May it please the Court, I now ask that the record show that I am reading into the

(Testimony of Michael Maffei.)

record the minutes beginning with page 2 of Volume 2, entitled, "Waiver of notice," [62] and ending on page 15. On page 2 it deals with the special meeting of the board of directors called by the Associated Calitalo Holdings, Limited, Inc. for May 9, 1931, and authorizing the execution of a certain agreement which is found beginning with page 9 and ending with page 15.

Q. Now, you said this morning, if I recall, Mr. Maffei, and if I quote you incorrectly I stand corrected, that you thought or believed that Mr. Bercut became a director of the holding company, if I remember accurately, sometime in 1931, you said.

Mr. Naus: That was not his testimony.

Mr. Scampini: When did he become a director, do you recall?

A. I think Mr. Bercut was a director sometime between 1929 and 1930. The minute book will show that.

Q. I will now read from the minutes, Volume 2, beginning with page 65, being minutes of the meeting of the stockholders held February 15, 1933.

Mr. Naus: Are you trying to establish that he was first a director on that date?

Mr. Scampini: That is right, the first time he was a director was on February 9, 1933.

I will now read into the record the minutes of the special meeting of the board of directors of Associated Calitalo Holdings, Limited, Inc. held January 4, 1934, found on pages 149 to 153, inclusive,

(Testimony of Michael Maffei.)

which minutes deal with the incorporation or creation of Pacific Empire Corporation, in Volume 3, and the minutes recite that the following director was absent: Peter Bercut, the directors present being George W. Hope, Luigi Giachini, James Bernardini, M. Maffei, L. R. Arnold, and A. A. Heer, Jr. Peter Bercut is absent. That is the signature of Mr. Maffei, is it [63] not? A. Yes.

Q. And that is Mr. Arnold's?

A. That is right.

Q. On page 154 of Volume 3, Mr. Maffei, and as a part of the minutes which I have just read into the record, there appears to be an Exhibit A referred to in the minutes, on the stationery of Associated Calitalo Holdings, Limited, addressed to the stockholders of the City National Bank, San Francisco, Liquidating, dated August 10, 1933, and I will ask you whether or not that is a facsimile of your signature at the bottom of that letter.

A. It is.

Q. Was this letter sent to the stockholders of the City National Bank of San Francisco?

A. It must have been sent out.

Mr. Scampini: I will ask that that letter be read into the record. Now I am reading from the minutes of the annual meeting of the stockholders of Associated Calitalo Holdings, Limited, held on Thursday, February 15, 1934, at the office of the company in the City and County of San Francisco, found on pages 166 to 168, inclusive, and especially the balance sheet rendered as of December 31, 1933,

(Testimony of Michael Maffei.)

designated as Exhibit A, attached to said minutes, on page 169, and I will ask you whether that is your signature at the bottom. A. Yes.

Q. Is that the signature of Arnold acting as Secretary of the meeting and you as chairman of the meeting? A. Yes.

Q. And the balance sheet of the company found on page 169 entitled "Exhibit A" is the balance sheet of the company as of December 31, 1933, is that right? A. That is right.

Q. Showing total assets of the book value of \$832,074.60, is that right? A. Yes.

Q. Now, the Merchants Ice & Cold Storage stock on that date is stated as of the par value of \$31,201.20. A. Yes. [64]

Q. That is December 31, 1933? A. Yes.

Q. On page 172 it is recited that Mr. Maffei, L. R. Arnold, A. A. Heer, Jr., James Bernardini, Luigi Giachini, Peter Bercut and George Hope were elected as directors. Now, following that meeting, there was, was there not, as shown by the minute book, a meeting of the board, which is found on pages 174 et seq., which appears to have been held pursuant to a waiver of notice and I will ask you whether or not you recognize the signatures which are found on page 174. A. Yes.

Q. Is Peter Bercut's signature there?

A. Yes.

Q. I desire to read from page 175, Volume 3, in which it is recited: "The meeting thereupon proceeded to election of officers, whereupon the fol-

(Testimony of Michael Maffei.)

lowing names were proposed for the respective offices shown: M. Maffei, President, A. A. Heer, Jr., First Vice-President, Peter Bercut, Second Vice-President, L. R. Arnold, Secretary-Treasurer."

Who was A. A. Heer, Jr. at that time?

A. In what way?

Mr. Naus: He was a director.

Mr. Scampini: Was he a director?

A. That is what he was.

Mr. Scampini: I now read into the record from Volume 4 of the minute book, minutes of meeting of board held February 19, 1935, found on pages 42 et seq., pursuant to a waiver of notice of special meeting found on page 42 signed apparently by all the directors, and ask you whether or not you recognize the signatures of the directors on that page. A. They are.

Q. Mr. Bercut and yourself and Mr. Arnold are also here? A. Yes.

Q. I now read from the minutes on page 42: "The meeting thereupon proceeded to the election of officers, thereupon the following names were proposed for the respective offices shown: M. Maffei [65] President, L. R. Arnold, Vice-President and Secretary, Peter Bercut, Second Vice-President, A. A. Heer, Jr., Treasurer and Assistant Secretary."

On page 43 it is recited, "The chairman announced that the election of an executive committee was the next order of business, thereupon, the fol-

(Testimony of Michael Maffei.)

lowing names were proposed: M. Maffei, L. R. Arnold, Peter Bercut.

“The chairman declared the nominations closed, thereupon by unanimous vote of all directors present, the individuals nominated were declared elected as members of the executive committee, to hold office during the ensuing year, or until their successors have been elected.”

I now read from page 46, etc. of Volume 4, dealing with the meeting of the executive committee of Pacific Empire Holdings, Incorporated, held March 30, 1935, in which it is recited that, “The following members were present and acting: M. Maffei, L. R. Arnold, Peter Bercut. Absent none.”

“M. Maffei, President, acted as chairman of the meeting, and L. R. Arnold acted as secretary.

“The chairman determined the existence of a quorum proper and sufficient to transact business and thereupon called the meeting to order.

“The First Vice-President advised the Executive Committee that pursuant to the authorization granted to this Committee by resolution adopted by the Board of Directors in the Special Meeting of February 19, 1935, negotiations were carried on with the Brotherhood of Locomotive Engineers at Cleveland, Ohio, for the purpose of discounting the \$100,000.00 note of that organization owed by this company, maturing December 17, 1935. As a result of these negotiations, the Brotherhood of Locomotive Engineers agreed to the dis- [66] count of the

(Testimony of Michael Maffei.)

said note at a figure to net this corporation the sum of \$80,000.00. Subsequently, negotiations were carried on with the Pacific National Bank of San Francisco, for the purpose of obtaining a more favorable discount, resulting that Pacific National Bank has agreed to discount the \$100,000.00 note of the Brotherhood of Locomotive Engineers at a figure to net the corporation the sum of \$90,000.00.

“Thereupon, by motion duly made, seconded, and unanimously carried, the following resolution was adopted:

“Whereas, the policy and general plan of the management calls for the immediate discount of the \$100,000.00 note of the Brotherhood of Locomotive Engineers, owned by this corporation, maturing December 17, 1935, for the best interests of the corporation, therefore be it

“Resolved: That the \$100,000.00 note herein referred to, be discounted with the Pacific National Bank of San Francisco, for the amount to net this corporation the sum of \$90,000.00, and be it

“Further resolved: That the President and the First Vice-President & Secretary, and the Treasurer be, and they hereby are authorized to pay from the proceeds thereof, any liens against said note, and to sign any documents necessary to carry out the purpose of this resolution.”

(Testimony of Michael Maffei.)

It appears on page 48, after this meeting, that you three members of the executive committee present approved the minutes by their signature. Do you find the signatures of Maffei, Arnold and Bercut there? A. That is correct.

Q. Then there is what purports to be Exhibit A found in the minutes on page 49, and this purports to be a letter dated April [67] 1, 1935, from Associated Calitalo Holdings, Limited to Stockholders of Pacific Empire Holdings, Inc., and appears to have been issued by the order of the board of directors over the signature of yourself as president, do you recognize it? A. Yes.

Q. Do you recognize that?

A. Yes, it went out.

Q. I notice, here, Mr. Maffei, on balance sheet which is Exhibit B, referred to in the minutes, under the heading of Assets of the Company, there is listed preferred stock of Merchants Ice & Cold Storage Company, \$41,490, common stock of Merchants Ice & Cold Storage Company, \$442,527.11, and opposite said two items there is a note marked "B", which is directed to a notation at the bottom of the balance sheet, opposite the small letter "b" in parentheses, which reads as follows: "Valuation based upon the value stated by the balance sheet of Merchants Ice & Cold Storage Company as of December 31, 1934, certified to by Messrs. Haskins & Sells, certified public accountants. No consideration has been given to unpaid cumulative dividends accruing on the preferred stock."

(Testimony of Michael Maffei.)

Now, Mr. Maffei, when this statement was sent out to the stockholders, I note that it recited in the minutes as follows:

“The Vice-President further presented the President’s letter and the printed consolidated balance sheet of the corporation, as prepared by the Treasurer for the purpose of advising the stockholders of the condition of the corporation as of the close of business, December 31, 1934, the said consolidated balance sheet and the books of the corporation and subsidiaries having been adjusted to reflect the estimated fair or liquidating value of all of the assets owned by the company.”

Did you at that time believe that the valuation placed upon these blocks of shares of preferred and of common stock was a [68] fair, reasonable value for the blocks of stock?

A. According to the statement of the Merchants Ice & Cold Storage Company it was.

Q. You actually bona fiedly believed that was a fair valuation to be placed on those shares of stock?

A. According to the figures of the Merchants Ice & Cold Storage Company.

Q. And that was an audit prepared by Haskins & Sells of the condition of affairs of the Merchants Ice & Cold Storage Company?

A. That is right.

Q. And the value placed on that stock was the value which you had from this audit? A. Yes.

Q. And Mr. Heer was at that time your treasurer? A. Yes.

(Testimony of Michael Maffei.)

Q. This block of stock which now aggregates a little over \$483,000 represents a very substantial increase over the \$30,000 which was reflected in the balance sheet of the company for the previous year. Does that reflect the result of the acquisition of the block of shares which were agreed to be sold to the company by William A. Sherman, George Stratton, Frederic Vincent and Joseph McInerney?

A. Yes.

Mr. Scampini: I am now reading into the record, may it please the Court, the minutes of the executive committee meeting of the Pacific Empire Holdings, Inc., held May 8, 1935, at the hour of 12:30 p. m., at the company's office, found on pages 52 and 53, Volume 4 of the minute book, at which meeting it is represented that the following were present: M. Maffei, L. R. Arnold, Peter Bercut. I will ask you whether you find the signatures of those three gentlemen at the end of the minutes under the head of "Approved"? A. Yes.

Q. Found on page 53? A. Yes.

Mr. Scampini: May it please the Court, I will read into [69] the record the following portion of the minutes:

"The First Vice-President reported to the committee upon the result of the negotiations carried on by him with Mr. Joseph McInerney"—at that time, Mr. Maffei, was Mr. Arnold the First Vice-President? A. Yes.

Mr. Scampini: "For the purpose of reorganizing

(Testimony of Michael Maffei.)

the corporation's indebtedness to the said Joseph McInerney, in order that the corporation and its affiliated company, Pacific Empire Corporation, could be placed in the position to loan funds to Merchants Ice & Cold Storage Company, enabling that company to meet its interest and sinking fund requirements on its bond outstandings which became due on April 1, 1935.

“Consequently, a tentative verbal agreement having been effected with Mr. Joseph McInerney prior to April 1, 1935, the corporation obtained sufficient funds permitting it and Pacific Empire Corporation to reloan to Merchants Ice and Cold Storage Company the sum of \$35,000. The First Vice-President then presented the agreement, to be dated this date, to be entered into between the said Joseph McInerney, Pacific Empire Corporation, Pacific Empire Holdings, Incorporated, and Merchants Ice & Cold Storage Company.”

“Thereupon, after full and complete discussion of all matters concerned and included in the Agreement, hereinabove referred to, upon motion duly made, seconded, and unanimously carried, the following resolution was adopted:

“Resolved: That the Agreement made and entered into on the 8th day of May, 1935, by and between this corporation in conjunction with Pacific Empire Corporation and Merchants Ice & Cold Storage Company, and Joseph McInerney, herein referred to as Exhibit ‘A’;

(Testimony of Michael Maffei.)

the two year Note of this [70] corporation signed jointly with Pacific Empire Corporation, and guaranteed by Merchants Ice & Cold Storage Company, in favor of the said Joseph McInerney, in the sum of \$50,000.00 herein referred to as Exhibit 'B'; the letter dated May 8, 1935, signed jointly by this corporation and Pacific Empire Corporation addressed to Joseph McInerney, herein referred to as Exhibit 'C'; the Assignment of Collateral dated May 8, 1935, signed jointly by this corporation and Pacific Empire Corporation in favor of Joseph McInerney, herein referred to as Exhibit 'D'; and the Acknowledgment of Satisfaction dated May 8, 1935, signed by Joseph McInerney in favor of this corporation, herein referred to as Exhibit 'E', be, and each of them are, hereby accepted, ratified, and approved, and be it

“Further Resolved: That the President and the First Vice-President & Secretary of this corporation be, and they are, hereby authorized and directed to sign on behalf of the corporation, the documents hereinabove referred to, and any other documents necessary in order to carry out the purpose of this resolution.”

Now, Mr. Maffei, I show you here what purports to be an original contract dated May 8, 1935, between Empire Corporation, a California corporation, and Pacific Empire Holdings, Inc., a Delaware corporation, as first parties, Merchants Ice &

(Testimony of Michael Maffei.)

Cold Storage Company, a California corporation, hereinafter known as second party, and Joseph McInerney, hereinafter known as third party, and it appears to be signed "Pacific Empire Corporation by M. Maffei, President, by A. A. Heer, Jr., Secretary, Pacific Empire Holdings, Inc., a Delaware corporation, by M. Maffei, President, by L. R. Arnold, Secretary, and Merchants Ice & Cold Storage [71] Company by W. A. Sherman, President, by Walter O. H. Plagemann, Secretary, second party, and Joseph McInerney, third party," and referred to in the minutes of this executive committee meeting and ask you if you recall that transaction.

A. Yes.

Mr. Naus: You may retain the original, and if there is any question raised it will be available.

Mr. Scampini: I do not desire to read it in haec verba, but I think it should be deemed that it was read into the record and the reporter will make a copy of the agreement entitled Exhibit A found on pages 54 to 58, inclusive, of Volume 4 of the minute book, which is the typewritten copy of the original agreement, which has been exhibited to Mr. Naus.

Mr. Naus: These minute books have been marked for identification. I do not see any necessity for the reporter to copy anything in. I make no objection to its going in evidence, but I do not see why the reporter should copy it.

Mr. Scampini: May it be deemed read?

Mr. Naus: The original minute books are in the

(Testimony of Michael Maffei.)

possession of the clerk, marked for identification, and whatever is received in evidence is in evidence without copying.

Mr. Scampini: The only objection is that the minute books properly should stay with the corporation officer, and only about five per cent of what is in the minute books is applicable or material to the controversy here, and I think it would be much better if you read the pertinent portions into the record.

The Court: I think it is important in presenting the case that I have an opportunity to follow anything that it is desired to call the court's attention to.

Mr. Naus: There will be some portions we will want to call attention to. [72]

The Court: Very well. Proceed.

Mr. Scampini: Q. Mr. Maffei, you said that you recalled that transaction, did you not?

A. Yes.

Q. Will you state the circumstances under which that agreement was entered into and the purpose of that agreement?

Mr. Naus: One moment: I make no objection as to the witness answering as to the circumstances under which it was made but when it asks for the purpose of the agreement, I think we had better leave the agreement speak for itself.

Mr. Scampini: Strike out the question.

Q. Will you please state the circumstances under which that agreement was entered into?

(Testimony of Michael Maffei.)

A. Well, I can't recall what the purpose of that contract was.

Q. But do you recall the circumstances under which this agreement was entered into?

A. I can't just recall what the purpose was at that time.

Q. What were the conditions of the Merchants Ice & Cold Storage Company at that time, if you recall?

Mr. Naus: Objected to as vague and indefinite. I don't know what he means by conditions.

Mr. Scampini: Q. What was the financial condition of the Merchants Ice & Cold Storage Company?

A. They needed financing.

Q. Was the Merchants Ice & Cold Storage Company in need of additional funds?

A. Additional capital.

Q. How much was it in need of financially?

A. Whatever they needed.

Q. Do you recall the reason why the company needed those funds at that time?

A. I think at that time they were paying the bonded interest.

Q. The bond interest or bond principal?

A. The interest and the [73] retirement.

Q. Did the Merchants Ice & Cold Storage Company have any funds with which to meet the interest on the bonds and the principal obligation at that time?

A. No.

Q. How did it obtain the funds?

(Testimony of Michael Maffei.)

A. Well, through our holding company.

Q. What did the holding company do in order to obtain the funds?

A. Well, they had to get the money.

Q. Whom did they get the money from?

A. They got some money from the Pacific National Bank.

Q. Did you also get \$50,000 recited in this agreement from Joseph McInerney?

A. I don't know as to that \$50,000.

Q. You executed a note to him?

A. We owed Joseph McInerney for the stock that we purchased from him.

Q. Did you pledge to Joseph McInerney the collateral which is entitled Exhibit "A" to secure the pledge?

A. I think the money was secured from a pledge.

Mr. Scampini: I will offer the contract in evidence.

The Court: It may be admitted and marked.

(The contract was marked "Plaintiff's Exhibit 8.")

PLAINTIFF'S EXHIBIT 8

AGREEMENT

This Agreement made and entered into at San Francisco, California, this 8th day of May, 1935 between Empire Corporation, a California corporation, and Pacific Empire Holdings, Inc., a Delaware corporation, hereinafter known as First Parties, Merchants Ice & Cold Storage Company, a Califor-

(Testimony of Michael Maffei.)

nia corporation, hereinafter known as Second Party, and Joseph McInerney, hereinafter known as Third Party,

Witnesseth:

The parties hereto are contracting relative to the following facts:

On March 30, 1935 Second Party was indebted to certain of its bondholders in the principal sum of Forty Thousand (\$40,000.00) Dollars, together with accrued interest, being the amount due and payable by said Second Party under its trust indenture for the installment of principal and interest due on April 1, 1935. Second Party did not have sufficient funds with which to meet and pay said installment of principal and interest in full.

First Parties together on said day were, and now are, the owners of a majority of the issued and outstanding common stock of said Second Party, and by virtue of said ownership First Parties on said day were, and now are, in control of the management of Second Party and did, on said day, and still have a very substantial interest in the preservation of the solvency and financial integrity of Second Party. By reason of said premises First Parties were desirous of enabling Second Party to meet, pay and discharge said 1935 installment of principal and interest due under its trust indenture. First Parties, in order to obtain the funds necessary to be advanced to Second Party, for the purpose of enabling said Second Party to meet, pay

(Testimony of Michael Maffei.)

and discharge its 1935 maturities of principal and interest, did thereupon borrow from Third Party the sum of Fifty Thousand (\$50,000.00) Dollars, and did thereupon loan and advance said sum to Second Party and Second Party did use the proceeds of said loan with which to meet, pay and discharge its said 1935 maturities of principal and interest;

Now Therefore, in consideration of the premises and for the purpose of giving to said Third Party evidence of said indebtedness, and for the purpose of securing the payment of said indebtedness to Third Party in accordance with a certain Memorandum of Agreement executed between First Parties and Third Party at the time of the delivery of the said sum of Fifty Thousand (\$50,000.00) Dollars by Third Party to said First Parties, the parties hereto do hereby agree with each other, as follows, to-wit:

First Parties do hereby agree to forthwith execute and deliver to Third Party their joint and several promissory note in the sum of Fifty Thousand (\$50,000.00) Dollars, due and payable as to principal on the 1st day of April, 1937; said note shall bear interest at the rate of six per cent (6%) per annum, due and payable one hundred and eighty (180) days after the execution of said note, and semi-annually thereafter; said promissory note shall be endorsed on the back thereof, and guaranteed by Second Party as to payment. In addition

(Testimony of Michael Maffei.)

thereto, and for the purpose of securing the payment of said promissory note according to its tenor, First Parties do hereby agree to forthwith deliver to Third Party, in pledge, the following securities, to-wit:

a) All of those shares of the capital stock of Merchants Ice & Cold Storage Company (be they common or preferred) now owned by either one of First Parties and fully described as to certificate number and number of shares on the hereto attached memorandum of securities pledged, which memorandum is made a part hereof as though herein at length set forth.

b) Three Hundred and Fifty (350) shares of the common capital stock of Pacific National Bank of San Francisco, a national banking association, represented by the certificates of stock and the number of shares therein mentioned as shown on the hereto attached memorandum of securities pledged.

c) An assignment executed by both of said First Parties to Third Party of all of their respective right, title, interest and equity in and to 421 number of shares of said common capital stock of said Pacific National Bank of San Francisco, now on deposit with said bank as collateral security for a loan made by said bank to Merchants Ice & Cold Storage Company in the sum of Ten Thousand (\$10,000.00) Dollars, which note was guaranteed as to payment by said First Parties.

d) First Parties do hereby agree to cause said

(Testimony of Michael Maffei.)

promissory note executed by Merchants Ice & Cold Storage Company to said bank in said sum of Ten Thousand (\$10,000.00) Dollars, or any renewal thereof, to be paid within a reasonable time from date hereof, and, upon such payment, the said Pacific National Bank of San Francisco shall be directed and authorized, and it is by these presents so directed and authorized, to deliver all of said shares of said common capital stock of Pacific National Bank of San Francisco to Third Party herein, to be held by said Third Party pursuant to, and in accordance with, this pledge.

All of the parties hereto further agree that in the event First Parties shall become and be in default in any of the payments of said promissory note, or any other of the terms, conditions and agreements herein set forth, Third Party may, if such default shall be continued for a period of thirty (30) days, forthwith take such steps as he may deem necessary or advisable to foreclose any or all of the assets so pledged, and to sell any or the whole thereof, or any or all of the right, title, interest or claim of First Parties therein, and shall apply the moneys received therefrom, first to the payment of costs therein, including reasonable attorneys' fees, then to the payment of interest accrued and unpaid, and the balance to the reduction or discharge of the principal sum of said note.

First Parties waive the provisions of Section 3005 of the Civil Code of California relative to the

(Testimony of Michael Maffei.)

manner of such pledges and agrees that any such sales may be public or private, and upon such notice or notices to First Parties as Third Party shall elect, and First Parties further agree to pay to Third Party whatever default may result after applying the net proceeds of such sale to the payment of said principal and interest thereon.

First Parties further agree that in the event the securities above referred to should decrease in its reasonable market value below the sum of Fifty Thousand Dollars (\$50,000.00), to forthwith, upon demand of Third Party, increase the collateral held in pledge to a sum above Fifty Thousand Dollars (\$50,000.00) and maintain the same at the reasonable market value of Fifty Thousand Dollars (\$50,000.00) or more until the termination of this agreement.

It is further agreed by and between the parties hereto that should any such foreclosure sale or sales be made, Third Party or his successors or assigns directly or in the name of any other person shall have the right to purchase any securities at such sale or sales.

In the event of any suit to enforce or defend any of the rights or claims of Third Party hereunder, First Parties agree to pay the costs and reasonable attorneys' fees therein, and that the amount thereof shall be secured by pledge or pledges herein provided. This memorandum is intended to express the agreement of the parties, and all of them agree to execute forthwith and in the future any and all

(Testimony of Michael Maffei.)

instruments or other documents which Third Party may deem necessary advisable to effect its purposes.

This agreement shall be binding upon and shall inure to the benefit of the heirs, executors, administrators, successors and assigns of all the parties hereto.

In Witness Whereof, First Parties have caused this agreement to be executed by their proper officers, thereunto duly authorized and their corporate seals to be affixed, and Second Party has caused this agreement to be executed by its proper officers, thereunto duly authorized and its corporate seal to be affixed, and Third Party has subscribed his name the day and year and at the place first herein mentioned.

PACIFIC EMPIRE CORPORATION

By M. MAFFEI

[Seal] President

By A. A. HEER, JR.

Secretary

PACIFIC EMPIRE HOLDINGS, INC.,

a Delaware corporation

By M. MAFFEI

[Seal] President

By L. R. ARNOLD

Secretary

First Parties

(Testimony of Michael Maffei.)

MERCHANTS ICE AND COLD
STORAGE COMPANY

By WM. A. SHERMAN

[Seal] President

By WALTER O. H. PLAGEMANN

Secretary

Second Party

JOSEPH McINERNEY

Third Party

\$50,000.00

April 1, 1935

Two (2) years after date, we, Pacific Empire Corporation, and Pacific Empire Holdings, Inc., jointly and severally agree and promise to pay to the order of Joseph McInerney, at the City and County of San Francisco, State of California, Fifty Thousand Dollars (\$50,000.00) in lawful money of the United States of America, with interest thereon at the rate of Six Per Cent (6%) per annum, from the first day of April, 1935, until paid, interest to be paid One Hundred Eighty (180) days after date of the execution of this note, and semi-annually thereafter, and if not so paid, the whole sum of both principal and interest to become due and payable upon the expiration of thirty days grace, at the option of the holder of this note. And in case suit or action is instituted to collect this note, or any part thereof, we jointly and severally promise and agree to pay in addition to the costs and disbursements provided by statute such additional sum as

(Testimony of Michael Maffei.)

the court may adjudge reasonable as attorneys' fees to be allowed in said suit or action.

In Witness Whereof, we have these presents caused to be executed by our officers, thereunto duly authorized by a resolution of our respective Board of Directors.

PACIFIC EMPIRE CORPORATION

By M. MAFFEI

[Seal] President

By A. A. HEER, JR.

Secretary

PACIFIC EMPIRE HOLDINGS, INC.,

By M. MAFFEI

[Seal] President

By L. R. ARNOLD

Secretary

GUARANTY OF PAYMENT

For value received, the undersigned does hereby guaranty and warrant the payment of the within note by the makers thereof, according to its tenure, and does hereby specifically waive any notice of default, non-payment, or protest, whether principal or interest, hereby ratifying any and all things or acts done by the holder of said note relative to any extension of maturity, either of principal or interest, or any renewal thereof.

In Witness Whereof, the undersigned has caused these presents to be executed this 8th day of May,

(Testimony of Michael Maffei.)

1935, by its officers thereunto duly authorized, and the Seal of the corporation to be affixed.

MERCHANTS ICE AND COLD
STORAGE COMPANY

By WM. A. SHERMAN

[Seal]

President

By WALTER O. H. PLAGEMANN

Secretary

(Testimony of Michael Maffei.)

EXHIBIT "A"

MEMORANDUM OF SECURITIES PLEDGED

Stock of Merchants Ice and Cold Storage Company

Certificate Number	Common Shares	Preferred Shares	Name
90	4,838		Helen H. Vincent
109	1,000		Con T. Shea
108	1,000		Con T. Shea
107	1,000		Con T. Shea
106	1,000		Con T. Shea
105	1,000		Con T. Shea
104	1,000		Con T. Shea
103	1,000		Con T. Shea
102	1,000		Con T. Shea
75	893 $\frac{1}{3}$		Anita M. Schiaulini
88	6,838		Florence Stratton
45	5,133 $\frac{1}{3}$		Florence Stratton
87	11,170		M. Carlson
10		3,990	M. Carlson
96	71		M. Maffei
92	1,600		Calitalo Investment Corporation
94	6,976		Associated Calitalo Holdings, Ltd., Inc.
13	2,893 $\frac{1}{3}$		Do
	1,531 $\frac{1}{3}$		Associated Sales Corporation

Stock of Pacific National Bank of San Francisco

Certificate Number	Common Shares	Preferred Shares	Name
A 218	50		Pacific Empire Corporation
A 216	100		Pacific Empire Corporation
A 215	100		Pacific Empire Corporation
A 217	100		Pacific Empire Corporation

(Testimony of Michael Maffei.)

Mr. Scampini: I now offer in evidence on pages 127 and 128 of Volume 4 of the minute book which deal with the minutes of the executive committee meeting of Pacific Empire Holdings, Inc., in which it is reported the following members were present and acting, M. Maffei, L. R. Arnold, Peter Bercut, absent none, and ask you whether you observe at the end of the minutes I am showing you the signatures of L. R. Arnold and Peter Bercut.

A. Yes.

Q. Your signature is not there. A. No.

Q. Were you present, do you recall?

A. I don't remember that. [74]

Q. If the minutes recite that you were present you would not say that they were incorrect, would you? A. No.

Mr. Scampini: I desire to read into the record the following:

"M. Maffei, President, acted as chairman of the meeting, and L. R. Arnold acted as Secretary.

"The chairman determined the existence of a quorum proper and sufficient to transact business, and thereupon called the meeting to order.

"Upon motion duly made, seconded and unanimously carried, the following resolution was adopted:

Resolved: That this corporation borrow from Joseph McInerney such sums of money from time to time as may be deemed necessary, not exceeding at any one time the total sum of Fifty

(Testimony of Michael Maffei.)

Thousand Dollars, and that as security for the repaying of such sum or sums, the President or the First Vice-President & Secretary, or the Treasurer are hereby authorized to execute in the name of and in behalf of this corporation such note or notes or other form of obligation, and such collateral or pledge agreements as may be required, and to pledge such assets of this corporation as may be required and agreed upon between such officers of this corporation and the said Joseph McInerney, and this corporation agrees to repay in currency of the Government of the United States, all amounts due or to become due from it to said Joseph McInerney.

“This authorization is to continue in full force and effect until revoked by a resolution of the Board of Directors of this corporation, and due notification of such resolution given to said Joseph McInerney.

“Upon motion duly made, seconded, and unanimously carried [75] the following resolution was adopted:

“Resolved: That the Agreement entered into by and between Pacific Empire Holdings, Incorporated and Joseph McInerney, dated April 24, 1936 be, and the same is hereby approved, the said Agreement to become a part of these minutes, herein referred to as Exhibit ‘A’, and be it

(Testimony of Michael Maffei.)

“Further Resolved: That the President and the Secretary be, and they are hereby directed to sign on behalf of the corporation, any other Agreements which may be necessary to carry out the purposes of the said Agreement hereinabove referred to.

“The President appointed Miss V. Picchi Assistant Secretary of the corporation, which appointment, by unanimous vote of all present, was ratified and approved.”

Q. Now, I show you, Mr. Maffei, what appears to be the original of Exhibit “A” found on pages 129 to 132 of the minute book, and referring to the agreement between the Pacific Empire Holdings, Inc., Merchants Ice & Cold Storage Company, and Joseph McInerney, dated April 24, 1936, and I will ask you to take a look at the original agreement and state whether or not you recall that contract.

A. I can remember the contract, but I can’t remember exactly what the money was used for at that time, whether it was used for Merchants Ice & Cold Storage Company, or what.

Mr. Scampini: I offer in evidence the agreement which is transcribed in the minute book as Exhibit “A”, and I assume the same stipulation may be made with respect to the agreement here that we made with respect to the last one, in other words, the minutes found on pages 129 to 132, inclusive, and the minutes may be deemed read into the record. [76]

(Testimony of Michael Maffei.)

Mr. Naus: And the original will be available?

Mr. Scampini: The original will be available to you at any time. Will it be so ordered, your Honor?

The Court: So ordered. It may be admitted and marked.

Mr. Scampini: In these minutes, Mr. Maffei, it is recited that the agreement Exhibit "A", referred to in the minutes, page 133—there is reflected an agreement dated the 24th of April 1936, between Pacific Empire Holdings, Inc., the Delaware corporation, first party, California Pacific Service, Inc., a California corporation, second party and Joseph McInerney, third party. I have not been able to find the original of that agreement, and I will ask the witness to look at the minutes and state whether or not he recognizes that transaction. Do you recall that, Mr. Maffei?

A. We had so many transactions that I do not recall; if it is in the minute book there is no point in asking me now.

Q. Did Pacific Empire Holdings, Inc. on or about April 24, 1936 have occasion to borrow the sum of \$18,000 from California Pacific Service, Inc., do you remember?

A. Not in one lump sum, because they did not have it.

Q. Did Pacific Empire Holdings, Inc., on or about April 24, 1936 find itself indebted to the Collector of Internal Revenue for a sum of money for taxes?

A. Right.

(Testimony of Michael Maffei.)

Q. How much, approximately, was that sum of money, do you recall?

A. I can't recall the amount.

Q. Did the Pacific Empire Holdings, Inc. find it necessary to obtain those funds?

A. We had to meet that assessment, we had to.

Q. Do you recall from whom the company borrowed the money for the purpose of paying the taxes?

A. I cannot recall whether it [77] was borrowed from an individual or from the bank.

Q. You have read this agreement, or a copy of the purported agreement which is found in the minute book which I have exhibited to you, and you do not recall that contract after your memory has been refreshed?

Mr. Naus: I object to the question as argumentative.

The Court: The objection is overruled. You may answer the question.

Mr. Scampini: Q. I will show it again to you, a copy of a purported agreement between Pacific Empire Holdings, Inc., first party, and California Pacific Service, Inc., second party, and Joseph McInerney, third party, dated April 24, 1936.

A. If that is in the minutes, that is correct.

Q. What was California Pacific Service, Inc.?

A. A laundry.

Q. Where was it? A. In Bakersfield.

Q. California Pacific Service, Inc. is a corporation? A. Right.

(Testimony of Michael Maffei.)

Q. A California corporation?

A. I think it is.

Q. And Pacific Empire Holdings, Inc. owned shares in that company? A. It did.

Q. How many shares, if you recall, did the holding company own?

A. I think about 96 per cent.

Q. Then was this laundry stock acquired by the Pacific Empire Holdings, Inc., if you remember?

A. I could not tell you exactly, I guess it was back quite a while.

Q. Do you know whether or not, Mr. Maffei, on January 8, 1941, Pacific Empire Holdings, Inc. retained or still owned this block of stock in the California Pacific Service, Inc., operating a laundry?

A. In 1941?

Q. January 8, 1941.

A. I think they only owned about one-half.

Q. To whom had the other half been sold or disposed of? [78] A. Joseph McInerney.

Q. Do you know whether or not, on or about December 31, 1940, and on January 8, 1941, Pacific Empire Holdings, Inc. was indebted to California Pacific Service, Inc.? A. They were.

Q. Do you recall or do you know whether it was quite a sum of money? A. I don't recall.

Q. Have you any recollection?

A. I have not.

Q. Do you know whether it was a small sum or a substantial sum?

(Testimony of Michael Maffei.)

A. It was a substantial sum.

Mr. Scampini: I now desire to read into the record the minutes of the special meeting of the executive committee held June 8, 1936, in which it is reported that M. Maffei, L. R. Arnold and Peter Bercut were present. It is found on pages 137 to 139 of Volume 4 of the minute books, and I will ask you whether or not you recognize the signatures of those three persons at the end of the minutes under the head of "Approved"? A. Yes.

Q. The minutes recite:

"M. Maffei, President, acted as chairman of the meeting, and L. R. Arnold acted as secretary.

"The chairman determined the existence of a quorum proper and sufficient to transact business, and thereupon called the meeting to order.

"Upon motion duly made, seconded and unanimously carried the following resolution was adopted:" (Reading)

What was the Globe Brewing Company?

A. A manufacturer of beer.

Q. Where is it located?

A. In San Francisco.

Q. The Pacific Empire Holdings, Inc. had a financial investment in Globe Brewing Company?

A. 50 per cent. interest.

Q. That investment, like other investments, proved to be an [79] unfortunate investment, is that right? A. Yes.

Q. Do you recall the reason why Pacific Empire

(Testimony of Michael Maffei.)

Holdings, Inc. made a 50 per cent investment in Globe Brewing Co.?

A. The Pacific Empire Holdings, Inc. was interested in the Merchants Ice & Cold Storage Co., and the Globe Brewing Company was a tenant and the holding company tried to save the Globe Brewing Company from going insolvent, and we put our money in it to keep it from doing so.

Q. Mr. Maffei, as I understand you, the Globe Brewing Company was a tenant of the Merchants Ice & Cold Storage Company? A. Yes.

Q. How much did that investment eventually cost, approximately?

A. Approximately, all told, about \$40,000.

Q. Do you know whether or not the Pacific Empire Holdings, Inc. under your management as president would have made the investment in the absence of the fact that Globe Brewing Company was a tenant of Merchants Ice & Cold Storage Company?

Mr. Naus: Objected to as immaterial, whether it would or not.

Mr. Scampini: The purpose of the question is to show the course of conduct in trying to build up the Merchants Ice & Cold Storage Company's business in making an investment in concerns which indirectly fed business into the Merchants Ice & Cold Storage Company.

The Court: The objection will be overruled.

Mr. Scampini: What is the answer?

A. It was building up assets for a tenant of the Merchants Ice & Cold Storage Company.

(Testimony of Michael Maffei.)

The Court: We will take a recess.

(Recess:) [80]

Mr. Scampini: Before I forget, I have not offered yet in evidence the agreement of April 24, 1936, which is the original agreement.

The Court: It may be admitted and marked.

(The document was marked "Plaintiff's Exhibit 9.")

PLAINTIFF'S EXHIBIT 9

AGREEMENT

Pacific Empire Holdings, Inc. and Merchants Ice and Cold Storage Company and Joseph McInerney.

This Agreement, made and entered into at San Francisco, this 24th day of April, 1936, between Pacific Empire Holdings, Inc., a Delaware corporation, hereinafter known as First Party, Merchants Ice and Cold Storage Company, a California corporation, hereinafter known as Second Party, and Joseph McInerney, hereinafter known as Third Party,

Witnesseth:

The parties hereto are contracting relative to the following facts:

On April 20th, 1936, Second Party was obligated to pay its taxes, due to the City and County Tax Collector of the City and County of San Francisco, in the approximate amount of Ninety-Six Hundred Dollars (\$9600.00). Second Party did not have suffi-

(Testimony of Michael Maffei.)

cient funds with which to meet and pay said taxes. First Party on said day was and now is the owner of a majority of the issued and outstanding common stock of said Second Party, and by virtue of said ownership, First Party on said day was and now is in control of the management of Second Party and did and still has a very substantial interest in the preservation of the solvency and financial integrity of Second Party.

By reason of said premises, First Party was desirous of enabling Second Party to meet, pay and discharge said obligation. First Party in order to obtain funds necessary to be advanced to Second Party for the purpose of enabling said Second Party to meet, pay and discharge its obligation, did thereupon borrow from Third Party the sum of Ten Thousand Dollars (\$10,000.00), and did thereupon loan and advance said sum to Second Party, and Second Party did use the proceeds of said loan with which to meet, pay and discharge its obligation, by paying its taxes on said date.

Now Therefore, in consideration of the premises and for the purpose of giving to said Third Party evidence of said indebtedness and for the purpose of securing the payment of said indebtedness to Third Party in accordance with said Memorandum of Agreement executed between First Party and Third Party at the time of delivery of said sum of Ten Thousand Dollars (\$10,000.00) by Third Party

(Testimony of Michael Maffei.)

to said First Party, the parties hereto do hereby agree with each other as follows, to-wit:

First Party does hereby agree to forthwith execute and deliver to Third Party its promissory note in the sum of Ten Thousand Dollars (\$10,000.00), due and payable as to principal six months from the 20th day of April, 1936, said note shall bear interest at the rate of Six Per Cent (6%) per annum, due and payable monthly. Said promissory note shall be endorsed on the back thereof, and guaranteed by Second Party as to payment.

In addition thereto, and for the purpose of securing payment of said promissory note according to its tenor, First Party does hereby agree to forthwith deliver to Third Party in pledge the following securities, which securities said First Party represents to Third Party that it owns free and clear, subject only to liens, hereinafter mentioned:

(a) Certificate numbered 89, representing Eleven Thousand Four Hundred Thirty-four (11434) shares of the common stock of Merchants Ice & Cold Storage Company;

(b) Certificate numbered 101, representing Three Hundred Twenty-six and Two-thirds ($326\frac{2}{3}$) shares of the common stock of Merchants Ice & Cold Storage Company;

(c) Certificate numbered 10, representing Nine Hundred (900) shares of preferred stock of Merchants Ice & Cold Storage Company. First Party represents to Third Party that it owns the afore-

(Testimony of Michael Maffei.)

mentioned shares of stock free and clear of any liens.

(d) An assignment executed by First Party to Third Party of all its respective right, title, interest and equity in and to each and all of the shares of stock represented by Certificate Number 7, representing Twenty-five Hundred (2500) shares, and Certificate Number 9, representing One Thousand (1000) shares of the preferred stock of Merchants Ice & Cold Storage Company, which are now held by the Delta Bank of Rio Vista as collateral for the payment of the sum of Two Thousand Dollars (\$2000.00), and upon the payment of said sum of Two Thousand Dollars (\$2000.00), said Delta Bank of Rio Vista shall be directed and authorized, and it is by these presents so directed and authorized to deliver all of said shares of said preferred stock of Merchants Ice & Cold Storage Company to Third Party herein, to be held by said Third Party pursuant to and in accordance with this pledge.

(e) An assignment executed by First Party of all their right, title, interest and equity in and to the following shares of stock:

(Testimony of Michael Maffei.)

Stock of Merchants Ice & Cold Storage Company

Certificate Number	Shares
90.....	4,838
109.....	1,000
108.....	1,000
107.....	1,000
106.....	1,000
105.....	1,000
104.....	1,000
103.....	1,000
102.....	1,000
75.....	893 $\frac{1}{3}$
88.....	6,838
45.....	5,133 $\frac{1}{3}$
87.....	11,170
6.....	3,990
96.....	71
92.....	1,600
94.....	6,976
93.....	2,893 $\frac{1}{3}$
132.....	1,531 $\frac{1}{3}$

Stock of Pacific National Bank of San Francisco

Certificate Number	Shares
A-218.....	50
A-216.....	100
A-215.....	100
A-217.....	100
A-187.....	421

said shares of stock now being on deposit with the Pacific National Bank of San Francisco as collateral security for a loan made by said bank to First Party in the sum of Fifty-Six Thousand Dollars (\$56,000.00), and for a loan made by said bank to Second Party in the sum of Ten Thousand

(Testimony of Michael Maffei.)

Dollars (\$10,000.00), the said Pacific National Bank of San Francisco shall be directed and authorized, and it is by these presents so directed and authorized to deliver all of said shares of stock to Third Party herein to be held by Third Party pursuant to and in accordance with this pledge.

It is further understood and agreed by and between the parties hereto that First Party shall not increase its indebtedness to the said Pacific National Bank of San Francisco in any sum in excess of the sum now due, owing and payable by First Party to said Pacific National Bank of San Francisco without the written consent of Third Party first had and obtained.

All of the parties hereto further agree that in the event First Party shall become and be in default in any of the payments of said promissory note, or any other of the terms, conditions and agreements herein set forth, Third Party may, if such default shall be continued for a period of Thirty (30) days, forthwith take such steps as he may deem necessary or advisable to foreclose any or all of the assets so pledged, and to sell any or the whole thereof, or any or all of the right, title, interest or claim of First Party therein, and shall apply the moneys received therefrom first to the payment of costs therein, including reasonable attorneys' fees, then to the payment of interest accrued and unpaid, and the balance to the reduction or discharge of the principal sum of said note.

(Testimony of Michael Maffei.)

First Party and Second Party waive the provisions of Section 3005 of the Civil Code of California relative to the manner of such pledges and agree that any such sales may be public or private, and upon such notice or notices to First Party as Third Party shall elect, and First Party further agrees to pay to Third Party whatever default may result after applying the net proceeds of such sale to the payment of said principal and interest thereon.

It is further agreed by and between the parties hereto that should any such foreclosure sale or sales be made, Third Party or his successors or assigns, directly or in the name of any other person, shall have the right to purchase any securities at such sale or sales.

In the event of any suit to enforce or defend any of the rights or claims of Third Party hereunder, First Party and Second Party agree to pay the costs and reasonable attorneys' fees therein, and that the amount thereof shall be secured by pledge or pledges herein provided. This memorandum is intended to express the agreement of the parties, and all of them agree to execute forthwith, and in the future, any and all instruments or other documents which Third Party may deem necessary advisable to affect its purposes.

This agreement shall be binding upon and shall inure to the benefit of the heirs, executors, adminis-

(Testimony of Michael Maffei.)

trators, successors and assigns of all the parties hereto.

In Witness Whereof, First Party has caused this agreement to be executed by its proper officers thereunto duly authorized and its corporate seal to be affixed, and Second Party has caused this agreement to be executed by its proper officers thereunto duly authorized, and its corporate seal to be affixed, and Third Party has subscribed his name the day and year and at the place first herein mentioned.

PACIFIC EMPIRE HOLDINGS, INC.

By M. MAFFEI

President

By L. R. ARNOLD

Secretary

First Party

[Seal]

MERCHANTS ICE AND COLD
STORAGE COMPANY

By WM. A. SHERMAN

President

By WALTER O. H. PLAGEMANN

Secretary

Second Party

[Seal]

JOSEPH McINERNEY
Third Party

Original also has
signature of

P. Empire Corporation

L.R.A.

(Testimony of Michael Maffei.)

Mr. Scampini: I desire to read into the record the minutes of the special meeting of the executive committee of the Pacific Empire Holdings, Inc., held on May 17, 1935, found at pages 64 and 65 of Volume 4 of the minute books, together with the exhibits thereto attached, Exhibits A and B on pages 66 to 69, inclusive, at which meeting it was reported were present M. Maffei, L. R. Arnold and Peter Bercut.

Q. I will ask you whether or not the signatures contained under the heading, "Approved", on page 65, are the signatures of the three gentlemen in question? A. They are.

Mr. Scampini: The minutes read as follows:

"M. Maffei, President, acted as chairman of the meeting, and L. R. Arnold acted as secretary.

"The chairman determined the existence of a quorum proper and sufficient to transact business and thereupon called the meeting to order.

"The President advised the committee that the meeting was called for the purpose of acting upon the result of negotiations now concluded between the officers of this corporation and the officers of Pacific Empire Corporation, whereby this corporation will grant to Pacific Empire Corporation an option to purchase all of the preferred and common shares of Merchants Ice & Cold Storage Company now owned by this corporation."

I will now show you, Mr. Maffei, what purports to be the original document, copies of which are

(Testimony of Michael Maffei.)

transcribed in the minute [81] book as Exhibits "A" and "B", pages 66 to 69, inclusive, in Volume 4 of the minute books, one document entitled, "Agreement between Pacific Empire Holdings, Inc., a Delaware corporation, and Pacific Empire Corporation, a California corporation," and will ask you to look at it and state whether or not the signatures appearing thereon are known to you and whether or not the contract was executed by the two companies. A. Yes.

Q. I will ask you to look at the pledge, Exhibit B in the minute book, which is entitled, "Assignment of way of pledge," and will ask you whether that assignment was executed by the two companies.

A. Yes.

Mr. Scampini: I will now offer in evidence in lieu of the originals as already stated photostatic copies of the agreement and pledge.

The Court: They may be admitted and marked.

(The agreement referred to was marked "Plaintiff's Exhibit 10" and the pledge referred to was marked "Plaintiff's Exhibit 11.")

PLAINTIFF'S EXHIBIT 10

AGREEMENT

This Agreement made and entered into by and between Pacific Empire Holdings, Inc., a Delaware corporation, hereinafter known as first party, and Pacific Empire Corporation, a California corporation, hereinafter known as second party,

(Testimony of Michael Maffei.)

Witnesseth:

Whereas, first *part* is now the owner of 49,944 $\frac{1}{3}$ shares of the common stock of Merchants Ice & Cold Storage Company, and of 3,990 shares of the preferred stock of said Merchants Ice & Cold Storage Company, all of which said shares of stock are held in pledge by Joseph McEnerney, as security for the payment to said Joseph McEnerney of a promissory note dated May 8, 1935, in the sum of Fifty Thousand (\$50,000) Dollars, payable on or before two years after date, executed jointly by first party and second party, which promissory note is further secured as to payment by additional collateral pledged with said Joseph McEnerney under an agreement executed jointly between said Joseph McEnerney and first party and second party herein, also bearing date of May 8, 1935, a copy of which agreement, promissory note and collateral pledge as security for the payment thereof, is hereto attached and made a part hereof by reference; and,

Whereas, the said number of shares of common and preferred stock of Merchants Ice & Cold Storage Company owned by first party represents the controlling interest of said corporation; and,

Whereas, second party is desirous of obtaining an option from first party for a period of three years from date hereof, within which to purchase all of said shares of Merchants Ice & Cold Storage Company hereinabove referred to, for the sum of \$484,000.00, payable in lawful money of the United

(Testimony of Michael Maffei.)

States on the exercise of the option, free and clear, however, of any liens or encumbrances; and,

Whereas, first party is willing to grant to second party such an option in consideration of the granting by second party to first party of the hereinafter mentioned accommodation.

Now, Therefore, in consideration of the premises, it is hereby mutually agreed as follows:

(1) Second party does hereby agree, as a consideration for the granting to it by first party of the option hereinafter referred to, to loan and advance from time to time to said first party the sum of Fifty Thousand (\$50,000) Dollars. Said advancement of Fifty Thousand (\$50,000) Dollars shall be made by second party to first party, as the needs of first party may require, and as the ability of second party to furnish said advancement may permit.

(2) It is hereby declared and admitted that on the date hereof second party has made an advancement and loan to first party on account of said Fifty Thousand (\$50,000) Dollar commitment above specified, the sum of \$38,800.00, and that there is on this day a balance due from second party to first party, under said above commitment, only the sum of \$11,200.00.

(3) First party does hereby agree to immediately execute and deliver under the seal of the corporation, to second party, its promissory note in the amount that the said advancements are made by sec-

(Testimony of Michael Maffei.)

ond party to first party from time to time, and in no event in excess of Fifty Thousand (\$50,000) Dollars, each of said promissory notes to be payable on or before five years from date hereof, with interest thereon at six (6%) per cent per annum, and each of said notes shall be secured by an assignment from first party to second party of all the right, title and interest of first party in and to each and all of said common and preferred shares of Merchants Ice & Cold Storage Company herein referred to, now on pledge with and subject to the pledge of said Joseph McEnerney. Interest on each of said notes given as evidence of said loan and advancement by second party to first party, shall be payable quarterly, and each of said notes shall have a principal acceleration clause in the event of failure to pay such interest when due.

(4) First party does hereby grant to second party an option to purchase, at any time within three years from date hereof, 49,944 $\frac{1}{3}$ shares of the common, and 3,990 shares of the preferred stock of Merchants Ice & Cold Storage Company, a California corporation, free and clear of any liens or encumbrances thereon, for the sum of \$484,000.00, payable in lawful money of the United States on the exercise of such option by second party. In the event of the exercise of said option by second party, in accordance with the terms hereof, any and all advancement or loan theretofore made by second

(Testimony of Michael Maffei.)

party to first party, in accordance with the foregoing commitment, and any and all other indebtedness or obligation owing by first party to second party at said time, shall be credited to said purchase price, and be considered as having been paid on account thereof.

(5) Second party does hereby admit and agree that the said promissory note, in the sum of Fifty Thousand (\$50,000) Dollars dated May 8, 1935, executed jointly between first party and second party to said Joseph McEnerney is the sole obligation of second party, and that second party will pay and discharge the same according to its tenor, holding and saving first party free and harmless from any and all liabilities or obligations thereunder, and that upon such payment and discharge of said note, there shall be returned to first party all of the collateral of every kind and character pledged by first party jointly with second party to said Joseph McEnerney, as security for the payment thereof. Second party does further agree to save and keep harmless Merchants Ice & Cold Storage Company from any and all obligation or liability created upon it by virtue of the endorsement and guarantee of payment executed by said Merchants Ice & Cold Storage Company, to said Joseph McEnerney as to said note.

In Witness Whereof the parties have hereunto set their hands, by their officers thereto properly

(Testimony of Michael Maffei.)
authorized by resolution of its board of directors,
this 15th day of May, 1935.

PACIFIC EMPIRE HOLDINGS, INC.,
a corporation,

By L. R. ARNOLD

1st Vice-President

By A. A. HEER, JR.

Treasurer

First Party

[Seal]

PACIFIC EMPIRE CORPORATION,
a corporation,

By M. MAFFEI

President

By A. A. HEER, JR.

Secretary

Second Party

[Seal]

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No.
22339R. Plfs. Ex. No. 10. Filed 4-20-43. Walter
B. Maling, Clerk. By J. P. Welsh, Deputy Clerk.

PLAINTIFF'S EXHIBIT 11

ASSIGNMENT BY WAY OF PLEDGE

Know All Men by These Presents:

That whereas Pacific Empire Holdings, Inc., a
corporation, hereinafter known as First Party, and
Pacific Empire Corporation, a California corpora-
tion, hereinafter known as Second Party, did, on

(Testimony of Michael Maffei.)

the 15th day of May, 1935, enter into an agreement, a copy of which agreement is hereto attached and made a part hereof by reference; and

Whereas, under and by virtue of said agreement First Party did agree to assign over and unto Second Party 49,944 $\frac{1}{3}$ number of shares of common stock, and 3,990 number of preferred stock, of Merchants Ice & Cold Storage Company, a California corporation, as security for the payment to said Pacific Empire Corporation of any and all indebtedness due or owing by First Party to Second Party under the said agreement and created by virtue of loans to be made pursuant thereto by Second Party to First Party;

Now Therefore, in consideration of the premises and as and for the purpose of securing the payment of any and all of such obligations incurred by First Party to Second Party, and for the purpose of paying, according to their respective tenors, any and all promissory notes or other evidences of indebtedness now owing, or hereafter to be incurred, by First Party, either pursuant to said agreement, or by reason of any other acts of borrowing by First Party from Second Party, or by reason of any assumption of any liability by First Party from Second Party, or for any other reason whatever, First Party does hereby assign, transfer and sell and set over unto Second Party 49,944 $\frac{1}{3}$ number of shares of the common stock, and 3,990 number of shares of preferred stock of Merchants Ice & Cold Storage Company, a corporation, represented by the certificates

(Testimony of Michael Maffei.)

of stock described on the hereto attached Exhibit "A", all of which said shares of stock and certificates are now on pledge with Joseph McInerney as security, together with other collateral, for the payment to said Joseph McInerney of a promissory note in the sum of Fifty Thousand (\$50,000.00) Dollars, dated May 8, 1935, executed jointly to said Joseph McInerney by First Party and Second Party herein;

This assignment by way of pledge is executed specifically subject to the lien created by said pledge to said Joseph McInerney, and Second Party does hereby accept the assignment, transfer and sale of said shares, as security for the payment of the indebtedness hereinabove referred to, subject to the lien created in favor of said Joseph McInerney by said pledge agreement, and does further admit and declare that the said promissory note in the sum of Fifty Thousand (\$50,000.00) Dollars, executed jointly between the First Party and Second Party to said Joseph McInerney, is the primary and sole obligation of Second Party herein, and said promissory note is to be paid according to its tenor by Second Party herein, and any and all collateral pledged with said Joseph McInerney by First Party herein, as security for the payment of said promissory note, is the sole and absolute property of First Party and is to be returned to First Party free and clear of any claims on the part of said

(Testimony of Michael Maffei.)

Joseph McInerney arising out of said promissory note for which the same are held as security.

In Witness Whereof, the parties hereto have hereunto set their hands this 15th day of May, 1935, by their officers thereunto properly authorized by a resolution of their respective board of directors.

PACIFIC EMPIRE HOLDINGS, INC.,
a Delaware corporation,

By L. R. ARNOLD

1st Vice-President

By A. A. HEER, JR.

Treasurer

[Seal]

PACIFIC EMPIRE CORPORATION,
a corporation,

By M. MAFFEI

President

By A. A. HEER, JR.

Secretary

[Seal]

Mr. Scampini: I will now read from the minutes of quarterly meeting of the board of directors of Pacific Empire Holdings, Inc. found on pages 141 and 142, inclusive, pursuant to waiver of notice of quarterly meeting of the board, dated July 15, 1936, which appears to be signed by all the directors.

Q. Do you recognize the signatures of yourself and Mr. Arnold? A. Yes.

(Testimony of Michael Maffei.)

Q. It reads as follows:

“The regular quarterly meeting of the Board of Directors of Pacific Empire Holdings, Incorporated was held at the office of the company, 26 O’Farrell Street, San Francisco, California, on Wednesday, the 15th day of July, 1936, at the hour of 10:00 o’clock [82] a. m., pursuant to waiver of notice of said meeting preceding these minutes and made a part hereof.

“The President made a general report to the directors upon the condition of the company, and upon its other investments and operating units, and discussed at length the program being worked out by the Merchants Ice & Cold Storage Company with its bondholders, for the purpose of obtaining from them a five-year waiver of the sinking fund requirements, in order that the Merchants Ice & Cold Storage Company could have sufficient relief from a cash standpoint to enable it to retire its obligations, including amounts owing to this corporation and Pacific Empire Corporation.

“The President also presented to the Board of Directors for approval, the agreement entered into on April 23, 1936, between this corporation, Merchants Ice & Cold Storage Company, L. Sozzi and A. J. Scampini, in connection with the purchase of a 50 per cent interest in the Globe Brewing Company. Upon full and complete discussion of the matter and such benefits as should accrue to the corporation through the acquisition of an interest

(Testimony of Michael Maffei.)

in an additional operating unit, by motion duly made, seconded and unanimously carried, the following resolution was adopted:

“Resolved: That the action of the President and the Secretary in signing on behalf of the corporation, the agreement entered into on the 23rd day of April, 1936, by and between Pacific Empire Holdings, Incorporated, Merchants Ice & Cold Storage Company, L. Sozzi and A. J. Scampini, he ratified and approved, the said agreement to become a part of these minutes, herein referred to as Exhibit ‘A’.

The President advised the Board of Directors of the offer [83] which had been received from the Bank of America to purchase from this corporation, all the stock owned in the Delta Bank of Rio Vista. Upon motion duly made, seconded and unanimously carried, it was

“Resolved: That the Executive Committee be, and they are hereby authorized to act upon any offer which may be made to the corporation for the purchase of all of the shares of stock of Delta Bank of Rio Vista, in accordance with their best judgment.

“A certain discussion took place concerning the holding of the annual meetings of the stockholders.”

Q. You testified this morning in answer to a question of mine substantially to the effect when I asked you who managed the affairs of the company,

(Testimony of Michael Maffei.)

you testified that you and Mr. Arnold managed them. A. Right.

Q. Was it the custom of the company to call meetings of the executive committee when any matter of any importance came up for approval or rejection or decision?

Mr. Naus: One moment. Objected to as calling for the witness' conclusion.

The Court: Develop the facts, whatever they are.

Mr. Scampini: Q. Whenever any matter like the acquisition of any property involved any substantial sum of money, what would you do in connection with determining whether or not the investment should be made?

A. In which way, you mean selling or buying?

Q. Let us take buying, first.

A. We would buy whatever we wanted to buy and hold an executive meeting to pass upon it.

Q. If the executive committee passed upon it what would your next action be?

A. The next day we would hold a meeting of the board. [84]

Q. How often did you hold your meetings of the board?

A. Sometimes we would hold them three times a year or twice a year. The minute book will show you exactly.

Q. Whenever a meeting of the board was held would you present to the board the actions and con-

(Testimony of Michael Maffei.)

duct of the executive committee which had been ordered or approved prior to the holding of the meeting?

A. We would have the board pass upon whatever happened between that time.

Q. Whenever you had a deal for the disposition of property of the company, such as, for example, the Bank of Rio Vista, what would you do?

A. Well, we did not hold any meeting before we sold it.

Q. What would you do?

A. We would do the selling.

Q. I notice in the minutes that the corporation authorized the executive committee to act upon any offer which might be made to the corporation for these shares of stock.

A. The executive committee had the power.

Q. Would the board pass upon the action of the executive committee either before or after?

A. Well, the board gave the power to the executive committee to act, and naturally after the sale was made it was up to the board to pass upon it.

Q. You would then present it to the board in a subsequent meeting, is that correct? A. Yes.

Q. I now desire to read into the record the minutes of the special meeting of the board of directors of Pacific Empire Holdings, Inc., dated March 10, 1937, pursuant to a waiver of notice, found on pages 181, et seq. of Volume 4, and ask you whether you recognize the signatures appearing on the

(Testimony of Michael Maffei.)

waiver of notice. A. They all appear there.

Q. Peter Bercut does not appear? A. No.

[85]

Q. The minutes recite that Peter Bercut was absent. A. That is correct.

Q. The minutes read as follows:

“The following directors were present and acting: M. Maffei, L. R. Arnold, A. A. Heer, T. M. Ryerson, Luigi Giachini, James Bernardini. The following director was absent, Peter Bercut.

“M. Maffei acted as chairman of the meeting and L. R. Arnold acted as secretary.

“The chairman determined the existence of a quorum proper and sufficient to transact business, and thereupon called the meeting to order.

“The Secretary read the minutes of the quarterly meeting of the Board of Directors held on the 15th day of January, 1937, which upon motion duly made, seconded and unanimously carried, were approved as read.

“The meeting thereupon proceeded to the election of officers, thereupon the following names were proposed for the respective officers shown: M. Maffei, President, L. R. Arnold, First Vice-President and Secretary, Peter Bercut, Second Vice-President, A. A. Heer, Jr., Treasurer and Assistant Secretary.”

These pages are no longer numbered, Mr. Naus, but it is part of the minutes and read as follows:

“The First Vice-President presented the pro-

(Testimony of Michael Maffei.)

posed report of the management, and consolidated balance sheet of the corporation as of December 31, 1936, to be mailed in printed form to the stockholders. Thereupon, by motion duly made and seconded, the consolidated balance sheet and supporting schedule, together with a proposed report, was unanimously approved, and the Secretary was instructed to prepare the said report and balance sheet in final form and mail a copy of the said report and [86] balance sheet to each stockholder of record, the said report and balance sheet herein referred to as Exhibit 'A'."

I will now show you, Mr. Maffei, what purports to be the report to the stockholders under date of April 1, 1937, addressed to the Stockholders of Pacific Empire Holdings, Inc., which appears to be by order of the Board of Directors, Mr. Maffei. Do you recognize it? A. Yes.

Q. Was this report mailed to the stockholders?

A. It must have been mailed.

Q. I notice over here that the common stock of the Merchants Ice & Cold Storage Company is carried at \$513,207.07. A. That is right.

Q. And that the preferred stock is carried at \$48,490. A. Yes.

Q. Which represents a substantial increase from the previous report. During the interval did the company acquire any more shares in the Merchants Ice & Cold Storage Company?

A. They must have acquired more.

(Testimony of Michael Maffei.)

Q. Do you recall the transaction wherein and whereby you bought 700 shares of preferred stock from Mr. Roussell? A. Yes.

Q. Was he a director of the Merchants Ice & Cold Storage Company? A. Yes.

Q. Do you recall the price you paid for that stock? A. I think we paid par.

Q. \$10, 700 shares at \$10 would be \$7000?

A. Yes.

Q. I notice on the last page of the stockholders' report you say to the stockholders as follows: "Your Board of Directors wishes also to advise you, that during the year 1936 definite progress has been made by the management, in the consolidation and funding of the balance owing by the corporation on notes and accounts resulting directly from obligations previously contracted on [87] account of claims settled by the present management. Other than secured bank loans, the corporation has the ability to pay and discharge its obligations, in accordance with their tenure, without the liquidation of any of its major holdings, as listed in the accompanying balance sheet. In this connection, therefore, your Board of Directors wishes to report upon the sale of the stock owned by the corporation in the Delta Bank of Rio Vista, Rio Vista, California, which sale represents the final step to be taken in the liquidation of assets, believed to be unprofitable, in accordance with the policy previously adopted by the management. In this instance, the

(Testimony of Michael Maffei.)

proceeds therefrom were used toward the further reduction of obligations, and for the purpose of reinvestment. All steps which have been taken by your Board of Directors, during its supervision of the affairs of the corporation, have been in keeping with a definite plan for the development of the resources of the corporation for the benefit of its stockholders. Throughout this period, no unnecessary expenditures have been permitted, and administrative expense and salaries have been maintained at the minimum previously established, and no increase in such expenditures is contemplated or will be authorized."

You also say to your stockholders the following:

"Included also, in the investment of your corporation, as set forth in the accompanying balance sheet, is an amount representing a 50 per cent interest in the capital stock of Globe Brewing Company, acquired by your corporation at an extremely fair figure in proportion to its intrinsic value. The management wishes to point out, that while this acquisition represents an additional asset, it is not to be considered as an additional cash outlay of an expansion program. Your board of directors [88] desires to advise you that by virtue of inter-company claims existing by and between your corporation, Merchants Ice & Cold Storage Company, and Globe Brewing Company, the management of your corporation was able to sponsor and promote a general plan of reorganization of Globe Brewing Com-

(Testimony of Michael Maffei.)

pany, whereby, your corporation, for a limited investment, was able to acquire the stock interest in Globe Brewing Company, representing working control. Further, inasmuch as Globe Brewing Company is a tenant of Merchants Ice & Cold Storage Company, under lease and refrigeration contracts, its operation is essential and profitable to Merchants Ice & Cold Storage Company. In sponsoring the reorganization of the Globe Brewing Company, the conclusions of the management were based upon a thorough appraisal of the plant, machinery and equipment, representing one of the most modern in brewery installation, costing approximately \$240,000, and its belief in the present records of manufacture, output and distribution since relegalization. Future value and profits which may be realized by your corporation upon this investment cannot be estimated, nevertheless it is the opinion of the management that it should prove profitable, when the plans of the management of Globe Brewing Company have fully materialized."

Now, when you made those statements to your stockholders you actually believed them in good faith, didn't you? A. That is right.

Q. You believed them to be true? A. Yes.

Q. You had no reason to doubt the veracity of that statement? A. No.

Q. You also stated to your stockholders the following:

"Resulting from the efforts of the management,

(Testimony of Michael Maffei.)

in coopera- [89] tion with the management of Merchants Ice & Cold Storage Company, a plan of reorganization was worked out with the complete accord of interested banks, investment bankers, and creditors, and submitted with the approval of the Railroad Commission of the State of California, to the holders of mortgage bonds of that company. At this date, the management is pleased to report that the plan of reorganization of Merchants Ice & Cold Storage Company has received the full support and approval of its stockholders, bankers and creditors; and of its bondholders representing approximately 80 per cent of its outstanding first mortgage bonds. Thus, the successful conclusion of the efforts of the board of directors to place the largest investment of your corporation in a sound financial position, is assured. Greater earning power, which should be realized by Merchants Ice & Cold Storage Company, directly attributable to the constructive features included in the plan of reorganization, combined with its continuously increasing volume of business, should ultimately result in greater earnings and appreciation in the value of its stock, and finally the increase in the value of the holdings of your corporation."

You actually believed that statement to represent the fair and true value of that business: is that correct? A. Correct.

Q. It is true, is it not, that the Merchants Ice & Cold Storage Company had just immediately prior

(Testimony of Michael Maffei.)

to its annual report filed in this court under 77(b) a plan of reorganization? A. Right.

Q. Wherein and whereby the bond indenture was modified so as to provide for a five-year postponement of the principal maturity under the bond?

A. That is right.

Q. That had been approved, as you stated, by the creditors, the banks and bondholders? A. Yes.

Q. And the court had also approved it, is that right? A. Yes. [90]

Q. You felt that that reorganization had improved substantially the financial condition of the company? A. That is true.

Q. Is it true or is it not true that as a result of that reorganization Merchants Ice & Cold Storage Company was in a much more healthy financial condition in 1937 than in 1936?

A. Naturally it was.

Q. I am now reading from page 2, Volume 5, of the minute book which deals with the minutes of special meeting of the Board of Directors of Pacific Empire Holdings, Incorporated, dated June 15, 1937. I will ask you whether or not you note Peter Bercut's signature on page 1, which is a waiver of notice? A. Correct.

Q. And the other directors are present except one? A. That is right.

Q. Now, the minutes read as follows:

"M. Maffei acted as Chairman of the meeting, and L. R. Arnold acted as Secretary.

(Testimony of Michael Maffei.)

“The Chairman determined the existence of a quorum proper and sufficient to transact business, and thereupon called the meeting to order.

“The Secretary read the minutes of the Special Meeting of the Board of Directors held on the 10th day of March, 1937, together with the minutes of the Executive Committee Meetings held on March 10th and 25th, respectively, which upon motion duly made, seconded, and unanimously carried, were approved as read.

“The First Vice-President reported upon the successful conclusion of the Reorganization of Merchants Ice & Cold Storage Company and presented the operating report as of April 30, 1937, and the Audit Report of Messrs. Haskins & Sells, as of the close of business, December 31, 1936, which by motion duly made, seconded [91] and unanimously carried, were ordered filed.

“The President made a report upon the business and the present condition of the Globe Brewing Company and presented a statement as of April 30, 1937, which statement was ordered to be included as a part of these minutes herein referred to as Exhibit ‘A’.

“The First Vice-President made a general report upon the condition and business of the California Pacific Service Company and presented a statement showing the operations of the Family Service Laundry at Bakersfield, and the condition of the company at the close of business, April 30th, 1937.

(Testimony of Michael Maffei.)

“Upon the conclusion of a general discussion concerning the present and future value of these companies, by motion duly made, seconded, and unanimously carried, the Secretary was instructed to include a copy of the Balance Sheet, and the Profit and Loss Statements in these minutes, herein referred to as Exhibit ‘B’.

“In the next order of business a general discussion ensued and the President and First Vice-President reported upon steps being taken and the progress made to date toward consolidating and funding the bank loans of the corporation and obligations owing to Joseph McInerney, etc., over a long term. Thereupon, by motion duly made, seconded, and unanimously carried, the President, Vice-President and Secretary were authorized to execute on behalf of the corporation, such notes or documents as may be necessary in connection with the consolidation of the obligations now owing by the corporation, in the event that the steps now being taken by the management should be successfully concluded.”

Now, at this meeting, which was not any different from the rest of the meetings, you were presenting to the board all of the [92] activities of your company and its subsidiaries? A. Yes.

Q. And at that time you were communicating, were you not, with the Pacific National Bank looking toward the refunding of the obligations of the Pacific Empire Holdings, Inc. and Pacific Empire Corporation, were you not? A. Yes.

(Testimony of Michael Maffei.)

Q. I now show you what appears to be an agreement dated September 1, 1937, by and between Pacific Empire Corporation and Pacific Empire Holdings, Inc., and Pacific National Bank of San Francisco, and ask you whether or not those are the parties who executed the agreement, and do you recall it? A. Yes, I recall it.

Q. In the execution of this agreement, you were acting pursuant to the authorizations which were given to you by the minutes of this board?

A. Yes.

Mr. Scampini: I ask that this be marked as our exhibit next in order.

(The document referred to was marked "Plaintiff's Exhibit 12.")

PLAINTIFF'S EXHIBIT No. 12

AGREEMENT

Between Pacific Empire Corporation and Pacific Empire Holdings, Inc. and Pacific National Bank of San Francisco

Dated: September 1st, 1937

This Agreement, executed this 1st day of September, 1937, by and between Pacific Empire Corporation, a corporation, and Pacific Empire Holdings, Inc., a corporation, hereinafter called "Corporations," and Pacific National Bank of San Francisco, a national banking association, hereinafter called "Bank,"—

(Testimony of Michael Maffei.)

Witnesseth:

Whereas, the Corporations are now indebted to the Bank in the sum of Fifty-six thousand (\$56,000.00) Dollars for monies loaned and evidenced by the promissory notes of the Corporations, and

Whereas, the parties desire to maintain and continue said loan for a period of three (3) years from and after the date hereof, said indebtedness to bear interest at the going rate for commercial loans, and

Whereas, Merchants Ice and Cold Storage Company is now indebted to said Bank in the sum of Twenty-four thousand, six hundred ninety and 72/100 (\$24,690.72) Dollars, evidenced by its promissory notes,—

Now, Therefore, in consideration of the premises, it is hereby mutually agreed as follows:

1. That the indebtedness owing from the Corporations to the Bank in the sum of Fifty-six thousand (\$56,000.00) Dollars shall be carried for a period of three (3) years from the date hereof, and during said period of time the Corporation shall continue to borrow, and the Bank shall continue to loan, said sum at the going rate of interest for commercial loans, provided that the Bank shall be privileged to call said loan and demand payment thereof in the event of default in payment of interest in accordance with the terms of the note or notes evidencing the indebtedness, and such default shall continue for a period of thirty (30) days, it being understood that said indebtedness shall be evidenced during

(Testimony of Michael Maffei.)

said period of time by the existing note or by renewal notes which shall be executed by the Corporations at any time upon request by the Bank.

2. The Corporations do hereby agree to pay or cause to be paid to the Bank on or before December 31st, 1937, the indebtedness of the Merchants Ice and Cold Storage Company amounting to Twenty-four thousand, six hundred ninety and 72/100 (\$24,690.72) Dollars, hereby assuming the obligations of said Merchants Ice and Cold Storage Company, in accordance with the terms of the notes or other evidences of said indebtedness, except as to date within which payment shall be made, to-wit: December 31st, 1937.

In Witness Whereof, the parties have caused these presents to be executed the day and year first hereinbefore written, by their officers thereunto duly authorized.

PACIFIC EMPIRE CORPORATION,

a corporation,

By M. MAFFEI

Its

By A. A. HEER JR.

Its

[Seal]

PACIFIC EMPIRE HOLDINGS, INC.,

a corporation,

By M. MAFFEI

Its

By L. R. ARNOLD

Its

(Testimony of Michael Maffei.)

[Seal]

PACIFIC NATIONAL BANK OF
SAN FRANCISCO, a national bank-
ing association,
By H. R. GAITHER
Its President

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No.
22339R. Plfs. Ex. No. 12. Filed 4-20-43. Walter B.
Maling, Clerk. By J. P. Welsh, Deputy Clerk.

The agreement, among other things, provides as follows:

“Whereas the corporations are now indebted to the bank in the sum of \$56,000 for monies loaned and evidenced by the promissory notes of the corporations, and

“Whereas, the parties desire to maintain and continue said loan for a period of three years from and after the date hereof, said indebtedness to bear interest at the going rate for commercial loan, and

“Whereas, Merchants Ice & Cold Storage Company is now indebted to said Bank in the sum of Twenty-four thousand, six hundred ninety and 72/100 (\$24,690.72) Dollars, evidenced by its promissory notes,—

“Now, Therefore, in consideration of the premises, it is hereby mutually agreed as follows: [93]

“1. That the indebtedness owing from the Corporations to the Bank in the sum of Fifty-six thou-

(Testimony of Michael Maffei.)

sand (\$56,000.00) Dollars shall be carried for a period of three (3) years from the date hereof, and during said period of time the Corporations shall continue to borrow, and the Bank shall continue to loan, said sum at the going rate of interest for commercial loans, provided that the Bank shall be privileged to call said loan and demand payment thereof in the event of default in payment of interest in accordance with the terms of the note or notes evidencing the indebtedness, and such default shall continue for a period of thirty (30) days, it being understood that said indebtedness shall be evidenced during said period of time by the existing note or by renewal notes which shall be executed by the Corporations at any time upon request by the Bank.

“2. The Corporations do hereby agree to pay or cause to be paid to the Bank on or before December 31st, 1937, the indebtedness of the Merchants Ice & Cold Storage Company amounting to Twenty-four thousand, six hundred ninety and $72/100$ (\$24,690.72) Dollars, hereby assuming the obligations of said Merchants Ice & Cold Storage Company, in accordance with the terms of the notes or other evidences of said indebtedness, except as to date within which payment shall be made, to-wit: December 31st, 1937.”

Do you recall whether or not this contract was executed and carried out?

Mr. Naus: You mean giving the three years' time to the Pacific Empire Corporation and Pacific Empire Holdings, Inc.?

(Testimony of Michael Maffei.)

Mr. Scampini: That is right.

A. Yes, that contract was.

Q. You assumed by virtue of that contract the \$24,000 debt of the [94] Merchants Ice & Cold Storage Company: is that right? A. Yes.

Q. Now, I wish to read into the record the minutes of the executive committee meeting of Pacific Empire Holdings, Inc. held July 22, 1937, found at page 4, et seq. of Volume 5:

“The following members were present and acting: M. Maffei, L. R. Arnold, Peter Bercut. Absent—None.”

The three signatures at the end of the meeting are theirs? A. They are.

Q. I desire to read into the record the following from the minutes:

“The President advised the Committee that the meeting was called for the purpose of considering and acting upon the matter relating to the guaranty by this corporation for the payment of a \$10,000.00 note to be executed by Merchants Ice & Cold Storage Company on behalf of the Anglo California National Bank of San Francisco matter, necessary to assist Merchants Ice & Cold Storage Company in paying part of its Reorganization expenses.”

Do you recall the transaction, Mr. Maffei, in which the Merchants Ice & Cold Storage Company was compelled to borrow \$10,000 from the Anglo California Bank of San Francisco to meet the expenses of the 77(b) proceeding?

A. I do not recall, but if it is in the minutes it must be O.K.

(Testimony of Michael Maffei.)

Q. You don't recall it, yourself? A. No.

Q. Do you recall guaranteeing the note of \$10,000 at the Anglo California National Bank?

A. I don't recall that.

Mr. Naus: They borrowed \$10,000 to pay for reorganization expense and it was guaranteed by the Pacific Empire Holdings, Inc. and Pacific Empire Corporation. In other words, it cost \$10,000 to put that reorganization through and your counsel fee was in that \$10,000. [95]

Mr. Scampini: We were allowed \$6000 fee in the case, which I think was fair compensation, and I still think it was a good reorganization.

Q. At that time Mr. Scampini was one of the directors of the Merchants Ice & Cold Storage Company? A. I think so.

Q. That is, prior to that, but he had also been a director of the Empire Pacific Corporation, and Mr. Scampini resigned as a director and counsel of the Merchants Ice & Cold Storage Company and Pacific Empire Corporation sometime in the year 1936? A. Right.

Q. Do you recall the circumstances under which he resigned? A. Right.

Q. What were the circumstances?

Mr. Naus: One moment. Wasn't the resignation in writing?

Mr. Scampini: In the form of a letter. It is a part of the minutes.

Mr. Naus: Why not put the letter in?

(Testimony of Michael Maffei.)

Mr. Scampini: I will be glad to put it in the record right now. Will it be stipulated that the minute book of the Pacific Empire Corporation is admitted in evidence?

Mr. Naus: No, not in evidence, let it be marked for identification.

(The minute book was marked "Plaintiff's Exhibit 13 for Identification.")

Mr. Scampini: This is Volume 1.

Q. I now ask you whether or not you recall a meeting of the Board of Directors of Pacific Empire Corporation, held Friday, September 25, 1936, at which the following directors were present and acting: M. Maffei, A. A. Heer, L. R. Arnold, Peter Bercut, and the following director was absent: A. J. Scampini? [96] A. Correct.

Q. It is recited in these minutes, may it please the Court, as follows—

Mr. Naus: Are these pages numbered?

Mr. Scampini: No, they are not numbered. Some are and some are not.

Mr. Naus: I was wondering whether the number appeared on what you are about to read.

Mr. Scampini: No, it is not numbered. It reads as follows:

"The Secretary read the minutes of the Regular Quarterly Meeting of the Board of Directors held on the 26th day of June, 1936, which by motion duly made and seconded, were unanimously approved as read.

(Testimony of Michael Maffei.)

“The President made a general report to the Board of Directors concerning the present condition of Pacific National Bank, and the increased value to the block of stock in that bank, owned by this corporation, and advised the Board that in his opinion and in the opinion of the present management of Pacific National Bank its condition will continue to improve, likewise the value of its stock; the stock at the present time paying six per cent dividend annually, with the possibility of a special dividend at the end of the current year.

“The President also reported to the Board upon the progress made in connection with the reorganization of Merchants Ice & Cold Storage Company, and gave his assurance that the plans now being carried on by the management of the parent company with various interested parties, including the E. H. Rollins & Sons and Stephenson-Leydecker & Co., underwriting firms, and the interested banks, their full cooperation was assured. The final consummation of this reorganization would ultimately place Mer- [97] chants Ice & Cold Storage Company in position to pay its obligations owing to this corporation.

“The written resignation as a Director and Counsel for the corporation, submitted by A. J. Scampini, was presented by the Secretary. In commenting upon the resignation of Mr. Scampini, the President observed that it was regrettable that the difference in opinion as to policy, which Mr. Scam-

(Testimony of Michael Maffei.)

pini apparently believed prevailed, was such that he deemed it advisable to no longer act as a Director or as counsel for the corporation, inasmuch as the formation of the corporation and its policies were thoroughly worked out with Mr. Scampini, both as Director and Counsel, it being the opinion that all steps taken were for the best interests of the corporation and its stockholders.

“Thereupon, by motion duly made, seconded, and unanimously carried, it was resolved that the resignation of Mr. A. J. Scampini as Director and Counsel be accepted with regrets. The Secretary was instructed to include the written resignation of Mr. Scampini dated August 17, 1936, as a part of these minutes, herein referred to as Exhibit ‘A’.”

There is attached the original letter, is there not, from Mr. Scampini? A. That is right.

Q. And it reads as follows. It is addressed to Pacific Empire Corporation, 26 O’Farrell Street, San Francisco, California. It is dated August 17, 1936, on the letterhead of Hettman & Scampini:

“You may consider this as my resignation as a Director and counsel for Pacific Empire Corporation.

“I have been constrained to make this decision, because of the fundamental differences of opinion prevailing between me and the management concerning the policies and conduct of the [98] company’s business, which leads me to the conclusion that for the best interests of the company I should

(Testimony of Michael Maffei.)

disassociate myself with it to the end that any responsibility attaching to and arising out of the management of the business of the company shall rest on the proper persons. I must observe, however, that since the formation of this company not a single directors' meeting has ever been held, and all decisions made by the management involving the company's properties have been made solely on the responsibility of its officers, without any ratification whatever on the part of its Board of Directors.

"I, therefore, must disclaim any responsibility whatever for any matter or thing done by the management in the premises.

"My office has been acting as counsel for the company since its organization, and in view of the fact that no settlement has ever been made with me looking towards the fixing of any compensation for any services so far, I suggest that you designate one of your officers to meet with me in an effort to arrive at an amicable settlement in that connection."

Q. Now, Mr. Maffei, at the time that this letter was received there were some differences of opinion between you and Mr. Arnold and I regarding policies, weren't there? A. That is right.

Q. There was not any ill feeling between us, was there? A. No.

Q. There has never been, as far as you know, has there? A. No.

(Testimony of Michael Maffei.)

Q. You had no trouble whatsoever in coming to an agreement with me as to the amount of my compensation, did you? A. Not at all.

Q. As a matter of fact, there was also disagreement between us with regard to the management of Merchants Ice & Cold Storage Company?

A. That is right.

Q. There were several things there that Mr. Sherman was doing [99] there that I did not approve of, isn't that right?

A. That is right.

Q. And I used to state my objections at the meeting of the board? A. Yes.

Q. And resigned from that board?

A. Yes.

Q. I was never an officer or director of Empire Pacific Holdings, Inc.? A. No.

Q. I was acting as counsel during those years?

A. Yes.

Q. And when this settlement was made my association with the holding company and all of its subsidiaries then ceased, is that right?

A. That is correct.

Q. I was never an officer or director of the holding company? A. No.

Q. Now, as part of the settlement which you made with regard to compensation due me for the work that I had done, you made a cash payment, did you not? A. Correct.

Q. You also executed a promissory note for I think \$5000? A. Whatever the amount was.

(Testimony of Michael Maffei.)

Q. As a matter of fact, on that promissory note from time to time something was paid on account, is that right? A. Correct.

Q. Did you ever get any demand from me to pay me any of it? A. No.

Q. As a matter of fact, there is still some owing today? A. There is.

Q. Did Mr. Scampini ever bother you about it?

A. No.

Q. But every once in a while he would call you up and ask why it was not paid?

A. Yes.

Q. He called you up after the deal with the Merchants Ice & Cold Storage Company was made?

A. Yes.

The Court: We will take an adjournment now until tomorrow [100] morning at ten o'clock.

(An adjournment was thereupon taken until tomorrow, Wednesday, April 21, 1943, at 10:00 o'clock a. m.) [101]

Wednesday, April 21, 1943—10:00 o'clock A. M.

MICHAEL MAFFEI,

recalled; Direct Examination (resumed):

Mr. Scampini: I am now reading into the record, may it please the Court, the minutes of the special meeting of the board of directors of Pacific

(Testimony of Michael Maffei.)

Empire Holdings, Inc., held February 11, 1938, found at pages 12 and 14 of Volume 5 of the minute books, at which it was reported the following directors were present and acting: M. Maffei, L. R. Arnold, A. A. Heer, Luigi Giachini, James Bernardini and Peter Bercut. The following director was absent: T. M. Ryerson.

“The chairman determined the existence of a quorum proper and sufficient to transact business, and thereupon called the meeting to order.

“The secretary read the minutes of the Special Meeting of the Board of Directors held on the 15th day of June, 1937, together with the minutes of the Executive Committee Meetings held on the 22nd day of July, 1937 and the 16th day of September, 1937, respectively, which upon motion duly made, seconded and unanimously carried were approved as read.

“The President made a general report upon the condition of the company and submitted the balance sheet of California Pacific Service Company, and the balance sheet and statement of profit and loss of Merchants Ice & Cold Storage Company. After a general discussion participated in by all members present, upon motion duly made, seconded and unanimously carried, the balance sheet and statement of profit and loss were accepted, to become a part of these minutes herein [104] referred to as Exhibits ‘A’ and ‘B’.

(Testimony of Michael Maffei.)

“The First Vice-President presented for approval, the memorandum of agreement entered into between this corporation and Joseph McInernery, which covered the sale of the corporation’s interest in Assured Thrift, Inc.”

Q. What was Assured Thrift, Inc.?

A. That was an insurance agent.

Q. Operated in Los Angeles, is that right?

A. No, it was being operated here; the one in Los Angeles was a different corporation.

Q. Did you own it completely? A. Yes.

Q. 100 per cent ownership? A. Yes.

Q. The corporation? A. Yes.

Q. How long had Pacific Empire Holdings, Inc. owned it?

A. We took that over from the Brotherhood.

Q. From the Brotherhood Investment Corporation?

A. From the Brotherhood Investment Company.

Q. What did you agree to sell that for to Mr. McInerney, for what price, do you know?

A. I don’t know. I think we owed Mr. McInerney about in the neighborhood of \$13,000, and we gave him that stock for that amount of money which we owed him.

Q. What necessity or what financial condition prompted you to dispose of this company—what financial requirements induced you to dispose of this company?

(Testimony of Michael Maffei.)

A. Well, there was no other way to pay McInerney off.

Q. I notice that it says here, "The First Vice-President stated that the reasons for this transaction was to reduce the company's obligations to Joseph McInerney based upon the original agreement now in force, and to secure an additional amount necessary to be loaned to Merchants Ice & Cold Storage Company to assist it in meeting its heavy commitments coming due in April, for bond [105] interest and taxes."

Does that bring to your mind the condition or the inducement which prompted you to dispose of this property?

A. The main thing was to dispose of it and reduce our indebtedness.

Q. You deemed it advisable to discuss disposition of this company with the Board of Directors before this transaction?

A. If it is in the minutes we must have.

Mr. Scampini: I will now read into the record the annual stockholders' meeting of the company, held in the City of Wilmington, February 15, 1938, the minutes of which are reported at pages 23 and 24 of Volume 5. It states that the following directors were elected for the year, M. Maffei, L. R. Arnold, A. A. Heer, Webb Richards, Peter Bercut and T. M. Ryerson. Who is Webb Richards? He is a new name here. When did he come into the company? A. He came in about that time.

(Testimony of Michael Maffei.)

Q. Whom did he succeed?

A. I think Mr. Bernardini.

Q. Now, Mr. Maffei, at this time the Pacific Empire Holdings, Inc. had acquired practically the entire outstanding capital stock of California Pacific Service, had it not? A. At that time?

Q. In 1938.

A. They never did have it all, they had about 98 per cent.

Mr. Naus: You mean at this time, or by this time?

Mr. Scampini: By this time.

Q. You had made this investment in Pacific Service, Inc. sometime in 1935 or 1936?

A. It must have been in the year, I could not tell you exactly, it must have been around 1933 or 1934 or 1935.

Q. Was Mr. Bercut a director in Pacific Service, Inc.?

A. I don't think he ever was.

Q. You don't think he ever was?

A. Not to my knowledge.

Q. I now read into the record from page 31 of Volume 5 of the [106] minute book of Pacific Empire Holdings, Inc., dealing with the special meeting of the newly elected board of directors of Pacific Empire Holdings, Inc., in which it is reported that the following directors were present: M. Maffei, L. R. Arnold, Peter Bercut.

Mr. Naus: What is the date of that meeting?

(Testimony of Michael Maffei.)

Mr. Scampini: February 21, 1938.

“The chairman determined the existence of a quorum proper and sufficient to transact business, and thereupon called the meeting to order.

“The secretary read the minutes of the special meeting of the Board of Directors held on the 11th day of February, 1938, which by motion duly made, seconded and unanimously carried, were approved as read.

“The meeting thereupon proceeded with the election of officers, the following names being proposed for the respective offices shown: M. Maffei, President, L. R. Arnold, First Vice-President and Secretary, Peter Bercut, Second Vice-President, A. A. Heer, Jr., Treasurer, J. M. De Vleig, Assistant Treasurer, L. Garwood, Assistant Secretary.”

I now read into the record page 34 of Volume 5, dealing with the minutes of the executive committee of the Pacific Empire Holdings, Inc., in which it is reported the following members were present and acting: M. Maffei, L. R. Arnold, Peter Bercut.

“M. Maffei, President, acted as chairman of the meeting and L. R. Arnold acted as secretary.

“The chairman determined the existence of a quorum proper and sufficient to transact business, and, thereupon called the meeting to order. [107]

(Testimony of Michael Maffei.)

“The chairman advised the committee that the meeting was called for the purpose of approving the actions of the officers in effecting the purchase of certain shares of preferred stock of Merchants Ice & Cold Storage Company.

“The Executive Vice-President, thereupon, reported to the committee that a total of 5516 $\frac{2}{3}$ shares of preferred stock had been purchased at the total cost of \$7604.68. The purchase of this stock was in accordance with the policy of the company to increase its holdings in Merchants Ice & Cold Storage Company whenever practicable to do so. In this connection, arrangements were made through the Anglo-California National Bank, whereby the purchase of 5516 $\frac{2}{3}$ shares of preferred stock was effected, and the notes of the corporation, total \$9,500, were given the California Baking Company in payment. The corporation receiving, therefor, the preferred shares referred to and \$1895.32.

“By motion duly made, seconded and carried, the following resolution was adopted:

“Whereas, on January 18, 1938, the corporation was able to increase its preferred holdings in Merchants Ice & Cold Storage Company by 5516 $\frac{2}{3}$ shares, at the total cost to the corporation of \$7604.68, and

“Whereas, the corporation was able to finance the said purchase through the Anglo California

(Testimony of Michael Maffei.)

National Bank by its notes aggregating \$9,500, issued in favor of California Baking Company, now, therefore, be it

“Resolved: That the actions of the officers in effecting the said purchase of 5516 $\frac{2}{3}$ preferred shares of stock of Merchants Ice & Cold Storage Company, hereinabove referred to, be and it is hereby approved.” [108]

Q. What was that block of stock, if you recall?

A. The block of stock was bought from Louis Sutter, of the Anglo Bank.

Q. Whom did he represent in the transaction?

A. I don't know who he represented.

Q. Wasn't this block of stock the block of stock of William A. Sherman?

A. It might have been, but I could not guarantee who the stock belonged to. I know the deal was made with Louis Sutter.

Q. Mr. Sutter was the Executor of the Estate of William A. Sherman, was he not, to your knowledge? T. I don't know.

Mr. Naus: He was one of two executors, wasn't he?

Mr. Scampini: Yes.

Q. Were you adding to the holdings of the Pacific Empire Holdings, Inc. in the Merchants Ice & Cold Storage Company whenever you had an opportunity to do so?

A. I think so, the minutes will prove that.

(Testimony of Michael Maffei.)

Mr. Naus: I ask that the answer go out as not responsive and as the conclusion of the witness.

The Court: It may go out.

Mr. Scampini: Will you read the question?

(Question read.)

A. We were.

Q. You already had control of the company at that time, did you not? A. That is right.

Q. You deemed it advisable and good business, and prudent business at that time?

A. At that time we thought it was a good buy.

Mr. Scampini: I now read into the record, may it please the Court, the minutes of the meeting of the board of directors held November 12, 1938, beginning with page 40 and ending with the exhibit attached thereto on page 54:

“At this meeting it was reported that the following members [109] were present and acting: M. Maffei, L. R. Arnold, A. A. Heer, Jr., Peter Bercut, Luigi Giachini, Webb Richards. The following director was absent: T. M. Ryerson.”

Q. Who was Ryerson?

A. He was manager of the laundry at Bakersfield.

Q. On page 41 it is set forth as follows:

“The Executive Vice-President further reported upon the steps taken by the management to place the company and subsidiaries in sufficient liquid condition to meet the demands of Merchants Ice & Cold Storage Company, pur-

(Testimony of Michael Maffei.)

suant to the previous authorizations of the Board of Directors and the Executive Committee resulting that 500 shares of stock of Pacific National Bank has been authorized to be sold by Pacific Empire Corporation. Pending the said sale, advances have been made by Pacific Empire Corporation and this corporation, aggregating to date, approximately \$35,000."

Will you now tell us or state to the best of your recollection exactly what you did on or about that time with regard to authorizing the disposition of the block of stock owned by Pacific Empire Corporation, as I understand it, in the Pacific National Bank of San Francisco.

A. Why it was sold?

Q. To the best of your recollection the circumstances under which it was sold.

A. Well, that block of stock was sold for the sole purpose of retiring our loans with the Pacific National Bank.

Q. Whose loans were they?

A. Whose loans?

Q. Yes.

A. I guess the loan of the Pacific Empire Holdings.

Q. Why had you incurred indebtedness at the Pacific National Bank of San Francisco?

A. To support the Merchants Ice & Cold Storage Company.

(Testimony of Michael Maffei.)

Q. You deemed it advisable to discuss at your board the authoriza- [110] tion to dispose of the block of stock in the Pacific National Bank of San Francisco?

A. Well, at that time I thought it was all right.

Q. But you deemed it advisable to get the approval of your board before the sale was authorized, did you?

A. I think the board passed on it after.

Q. Had you already sold that stock before this meeting, Mr. Maffei, this meeting having been held on November 12, 1938?

A. Well, doesn't it show in the minute book, there?

Q. I am asking you for your best recollection.

A. I don't remember.

Q. Isn't it true that 441 shares of this block of stock were not sold until 1942?

A. Well, there were other blocks.

Q. There were how many, altogether?

A. There were two blocks.

Q. There were 280 shares?

A. That is one.

Q. When was that sold?

A. I couldn't just remember the date it was sold.

Q. Was it sold about the time that the minutes which I have read show?

A. It must have been at the time.

Q. The subsequent block was sold in 1942, is that right?

A. Yes.

(Testimony of Michael Maffei.)

Q. I notice here on page 42, Mr. Maffei, in the minutes of this special meeting of the board of directors, the following statement:

“The Executive Vice-President reported to the Board of Directors upon the revenue stamp tax claims assessed against the corporation by the office of the Collector of Internal Revenue, on account of the acquisition during the year 1934, of the capital stock of California Pacific Service, Inc., then known as Laundry Service Company of California, and the granting of an option covering the sale of the shares [111] of stock of the said California Pacific Service, Inc.

“It was further reported that the firm of Messrs. Ellis & Steindorf, attorneys at law, have been engaged by the corporation to defend these claims, the said claims aggregating, with interest and penalties, approximately \$30,000. It was the opinion of the management that counsel should be retained on a contingency basis, which has been done according to the agreement dated September 12, 1938, entered into between this corporation and Messrs. Ellis & Steindorf, herein referred to as Exhibit ‘C’.

“Upon motion duly made, seconded and unanimously carried, the steps taken by the officers toward defending the revenue stamp tax claims assessed against the corporation by the Collector of Internal Revenue, were approved.”

(Testimony of Michael Maffei.)

Will you please state the circumstances giving rise to that statement in the minute book, to the best of your knowledge and recollection?

A. The whole transaction?

Q. As to this claim of the Government.

A. The claim of the Government was on the stock of the Laundry Service, at Bakersfield, at the time they took over the stock, they did not pay the transfer tax, and there was some option given at that time, which included 1931 or 1932—it came out of a clear sky.

Q. It came out of a clear sky?

A. That is correct.

Q. When it came out of a clear sky you deemed it advisable to defend the claim? A. Yes.

Q. You employed counsel on a contingent basis, didn't you? A. Yes.

Q. Percentage basis? A. Yes.

Q. But you deemed it advisable to discuss that with your board before you gave them a contract on it?

A. If it says that in the minutes naturally we did. [112]

Mr. Naus: I ask that that go out as not responsive.

Mr. Scampini: It is right in the minutes.

I desire now to read into the record the minutes of the executive committee meeting held December 16, 1938—the pages are no longer numbered, but they follow page 54. It reports the following mem-

(Testimony of Michael Maffei.)

bers were present and acting: M. Maffei, L. R. Arnold, Peter Bercut. Then it goes on to state:

“The chairman advised the committee that the meeting was called for the purpose of considering and acting upon the proposal to purchase certain shares of stock of Frostkraft Packing Corporation, a corporation, which is a tenant of Merchants Ice & Cold Storage Company, and organized under the sponsorship of the management of that company.

“The Executive Vice-President thereupon reported at length upon certain steps taken by the officers of this corporation to assist in the development of Frostkraft Packing Corporation, which program necessitates the acquisition of additional paid in capital. To that end, the firm of Messrs. Stephenson-Leydecker & Co., investment bankers, have agreed to assist in the sale and distribution of an additional 5000 shares of the stock of Frostkraft Packing Corporation. Applications for the permit to sell this new issue are now pending before the Division of Corporations of the State of California.

“The Executive Vice-President submitted certain data concerning the history and business of Frostkraft Packing Corporation, the plans for capitalization and development, the balance sheet and statistical data concerning the industry, etc. Upon the conclusion of a general discussion concerning Frostkraft Packing Corpo-

(Testimony of Michael Maffei.)

ration and the program for [113] its development, it was the recommendation of the Executive Vice-President that this corporation subscribe for 1000 shares of stock, to be paid for over a period of time, at a cost of \$10 per share, the corporation to receive a like number of shares as bonus stock."

Will you please state to the best of your knowledge and recollection the circumstances under which you thought it would be prudent business to invest an additional \$10,000 in a new corporation?

A. It was not \$10,000.

Q. How much did you subscribe?

A. It was one or two thousand dollars.

Q. What induced you to think it was good business for the holding company to invest a few thousand dollars in a new corporation?

A. Of course, that was a tenant of the Merchants Ice & Cold Storage Company, and I thought it would be a very lucrative investment, and we got a permit to sell some stock through the Leydecker Company, they sold a few thousand dollars and could not succeed in selling more.

Q. Did the holding company make an investment of \$2,000?

A. I think it was one or two thousand dollars.

Q. Who was the manager of the Merchants Ice & Cold Storage Company at that time?

Mr. Naus: At what time?

(Testimony of Michael Maffei.)

Mr. Scampini: December 16, 1938, do you remember?

A. William A. Sherman was.

Q. He was what? A. He was president.

Q. What were you?

A. I was vice-president.

Q. What was Mr. Arnold? A. Director.

Q. And Mr. Bercut?

A. I do not think Mr. Bercut was a director at that time. [114]

Q. Are you sure about that?

A. I am not sure, but I think he was not.

Q. Were you active in the management of the Merchants Ice & Cold Storage Company?

A. In and out.

Q. Were you drawing a salary at that time from the Merchants Ice & Cold Storage Company?

A. I can't recall if I was or not.

Q. Did Merchants Ice & Cold Storage Company make any investment in Frostkraft Packing Corporation at that time? A. I don't know.

Q. Don't you remember? A. I do not.

Q. You don't know?

A. Because I don't remember.

Q. Do you remember that Merchants Ice & Cold Storage Company extended considerable credit to Frostkraft Packing Corporation at that time?

A. I think they guaranteed some notes.

Q. Did you know about that at the time?

A. Well, more or less I did.

(Testimony of Michael Maffei.)

Q. Did you think it was good business to do so?

A. Well, the amount was so small that it did not amount to much, anyway.

Q. You were trying to build up the tenants, is that correct?

A. That is correct.

Q. I am now reading into the record from the minutes of the executive committee meeting of January 3, 1939; as I say, the pages are no longer numbered, but they follow page 56. It is reported at this meeting that the following members were present and acting: M. Maffei, L. R. Arnold, Peter Bercut.

“The chairman determined the existence of a quorum proper and sufficient to transact business, and thereupon called the meeting to order.

“The secretary read the minutes of the Executive [115] Committee meeting held on the 21st day of March, 1938, and the 16th day of December, 1938, which by motion duly made, seconded and unanimously carried, were approved as read.

“The President stated that the meeting was called for the purpose of discussing the obligations owing by the company to Joseph McInerney, which have been past due for a considerable time. The President reported that Mr. McInerney had been making strenuous demands for the payment of these notes, or, if the company is unable to pay, a compromise to be worked out on a basis satisfactory to him. The

(Testimony of Michael Maffei.)

company, being unable to pay, certain steps had been previously taken, within the knowledge of the Committee, to obtain small loans for the purpose of accumulating sufficient funds to discharge this obligation. The company has been able to raise only approximately \$5000.

“The President further reported that Mr. McInerney had proposed a compromise settlement whereby title would be given to him of the controlling interest in the stock of the California Pacific Service, Inc., with a pooling or voting agreement to be entered into between each of the parties. The Executive Committee entered into a further discussion of the subject and, upon motion duly made, seconded and unanimously carried, the following resolution was adopted:

“Whereas, a demand note in the amount of \$15,000 is owing to Joseph McInerney, and the corporation is at this date unable to pay the said note, and

“Whereas, it appearing for the best interest of the company that a compromise settlement be worked out in order [116] to discharge these obligations, now, therefore, be it

“Resolved: That the President, Vice-President and Secretary are hereby authorized to enter into negotiations with the said Joseph McInerney, to bring about a settlement of these obligations and report back to the Committee before the final settlement is concluded.”

(Testimony of Michael Maffei.)

About this time, Mr. Maffei, it is a fact, is it not, that the financial condition of the holding company was becoming very acute? A. Right.

Q. And the financial condition of the Pacific Empire Corporation was likewise becoming very acute, was it not? A. Yes.

Q. Will you state the reason why the financial condition of the Pacific Empire Corporation had become acute?

A. Well, they just got short of finances. We had to meet interest on the loans at the bank.

Q. Whose obligations are you referring to when you say "we"?

A. Well, we had notes by the holding company that had to be met.

Q. Had the holding company borrowed all it could borrow from the Pacific Empire Corporation? A. It borrowed all it could.

Q. Was there anything else left in the Pacific Empire Corporation which it borrowed at this time?

A. I don't think there was.

Q. And you deemed it advisable to sell the controlling interest in this laundry company to McInerney in an effort to compromise this claim for \$15,000?

A. Mr. McInerney was in a position, if he wanted to close, he could take it all.

Q. You thought it advisable?

A. I thought we had better lose half than all.

Q. You called the executive committee together

(Testimony of Michael Maffei.)

and discussed the whole matter before the executive committee, didn't you? [117]

A. If it says so in the minutes, we did.

Q. I am asking you, did you or did you not? Don't you recall that circumstance?

A. I don't recall it now.

Q. You do not? A. No.

Q. The reading of the minutes does not refresh your recollection in that respect?

A. We had so many meetings, as I said before, I don't remember.

Q. What was the reason for directing the executive vice-president, so-called, to conclude the negotiations and report back to the executive committee?

A. There was not much of a meeting, the only thing was it was concluded to make the deal and the deal went through.

Q. I did not ask you that. Will you read the question? That is not a reply to the question.

(Question read.)

A. Well, that was the only way for us to make the deal go through, so we did.

Q. But you were not willing to give your Vice-President full authority to go and make the deal?

A. I think he reported back to the committee.

Q. Did you direct him to report back to the executive committee?

A. He reported back to me.

Q. Were you the executive committee?

A. I was one of them.

(Testimony of Michael Maffei.)

Q. You said the reason was, among others, you had guaranteed notes. Whose notes had you guaranteed?

A. Well, we guaranteed our own notes when we made borrowings at the bank.

Q. Anybody else's notes?

A. And the notes upon the Pacific Empire Holdings' property.

Q. Had you guaranteed any of the Merchants Ice & Cold Storage Company's notes?

A. We guaranteed some, yes. [118]

Mr. Scampini: I now desire to read into the record the minutes of the special meeting of the newly elected board of directors of Pacific Empire Holdings, Inc., held February 15, 1939, following the stockholders meeting, and which is found on pages 63 to 65, inclusive, at which it is stated that the following directors were present: M. Maffei, L. R. Arnold, A. A. Heer, Jr., Peter Bercut, Luigi Giachini, Webb Richards. The following director was absent: T. M. Ryerson.

"The meeting thereupon proceeded with the election of officers, the following names being proposed for the respective offices shown: M. Maffei, President, L. R. Arnold, First Vice-President and Secretary, Peter Bercut, Second Vice-President, A. A. Heer, Jr., Treasurer.

"The chairman declared the nominations closed, thereupon, by unanimous vote of all Directors present, the individuals nominated were

(Testimony of Michael Maffei.)

declared elected to the respective offices shown, to hold office during the ensuing year, or until their successors had been elected, with annual salaries now prevailing, as authorized and set forth in minutes of previous meetings of the Board of Directors.

“Upon motion duly made, seconded and unanimously carried, the First Vice-President was authorized to use the title of Executive Vice-President, which authorization in no way alters the authority of the office of the First Vice-President in accordance with the provision of the by-laws.”

Do you recall the circumstances under which Mr. Arnold desired to be called executive vice-president?

A. Well, I suppose he wanted to be an executive vice-president. He was first vice-president and he could as well be executive vice-president.

Q. There is no mention of executive vice-president in the by-laws [119] which are now in evidence.

A. That is right, the by-laws do not call for one.

Q. Isn't that the reason why you inserted in there that it shall in no way alter the authority of the office of the first vice-president or increase the authority of the first vice-president?

A. I guess we gave him the title of executive vice-president for the sake of having that name.

Mr. Scampini: I desire to read into the record, in addition to what I have stated in connection with the minutes of the special meeting of the newly

(Testimony of Michael Maffei.)

elected directors of the Pacific Empire Holdings, Incorporated, shows that there is attached to these minutes, being pages 66 to 72, inclusive, the auditor's report of April 24, 1939, prepared by Haskins & Sells, certified public accountants, a copy of the auditor's report.

Now I desire to read into the record the minutes of the executive committee meeting held June 26, 1939, at the hour of 10:00 o'clock a.m., by which it was reported the following members were present and acting: M. Maffei, L. R. Arnold, Peter Bercut.

"The chairman advised the Committee that the purpose of the meeting was to consider and act upon the annual report and consolidated balance sheet to be mailed in printed form to all stockholders of record.

"The Executive Vice-President thereupon presented the proof of the printed report as prepared by him, and the consolidated balance sheet, as prepared by the Treasurer as of December 31, 1938. A general discussion took place concerning the subject contained in the report and the consolidated balance sheet, herein referred to as Exhibit 'A', and thereupon, by motion duly made, seconded and unanimously [120] carried, the said report and balance sheet were approved as prepared, and the Secretary was instructed to mail a printed copy of the said report and balance sheet to all stockholders of record."

(Testimony of Michael Maffei.)

Q. I now show you, Mr. Maffei, what appears to be the printed copy of the report, Exhibit A, referred to in the minutes of May 31, 1939, which appears to have been sent by order of the Board of Directors under the signatures of M. Maffei, President, and L. R. Arnold, Executive Vice-President. A. That is right.

Q. This went out to the stockholders, did it not?

A. Yes.

Q. I note in this report, found on page 78 in Volume 5, you state as follows, among other things——

The Court: Is this the report of the public accountants you are reading?

Mr. Scampini: No, the report to the stockholders.

“Merchants Ice & Cold Storage Co.: During the year 1938, even though the volume of business enjoyed by Merchants Ice & Cold Storage Company was \$71,429.78 less than that of the previous year, substantial progress was made by the management to restore the company to a sound financial condition. Bank loans, taxes and accounts payable to trade creditors, etc. were substantially reduced, resulting in the total reduction of current liabilities during the year of \$66,009.23. Throughout this retrenchment program, the condition of the company's physical properties was greatly improved by the installation of new plant improvements, completed during the year 1938 at the total installation cost of \$30,351.69.”

(Testimony of Michael Maffei.)

I note here that you still carried the common stock of [121] Merchants Ice & Cold Storage Company at \$522,638.25 and the preferred stock of Merchants Ice & Cold Storage Company at \$118,265.66.

A. Correct.

Q. And you stated to your stockholders:

“In previous annual reports, it was stated that, as a part of the program of the development of your corporation, your Board of Directors would, consistent with the corporation’s ability to do so, increase its investment position in any of the operating companies in which it is at present interested. To that end, during the annual period of 1938, and in accordance with the previously adopted policy, the preferred and common stockholdings in Merchants Ice and Cold Storage Company were increased by 18,727½ shares. In this connection, the management contemplates effecting additional acquisitions of either preferred or common stock whensoever the corporation is in position to do so.”

Did you feel that it was wise and prudent business, as president of the Pacific Empire Holdings, to continue to increase the investment of the holding company in Merchants Ice & Cold Storage Company?

A. At that time, yes.

Q. Every time you had an opportunity to buy some you would buy it, would you not?

A. Yes.

(Testimony of Michael Maffei.)

Q. Of course, you would buy it as quickly as you possibly could? A. Yes.

Q. Was there much activity in the sale of the stock? A. No.

Q. Every once in a while there would be a few shares come up? A. We would pick it up.

Q. You would pay the least possible price you could pay for it? A. Yes. [122]

Q. You would pick up the stock? A. Yes.

Q. I now desire to read into the record the minutes of the annual meeting of stockholders held on the 15th day of February, 1940, which minutes are found at pages 79 to 84, inclusive. At page 83, it is said that the following were elected as directors, M. Maffei, A. A. Heer, J. L. Arnold, Luigi Giachini, Webb Richards, Peter Bercut, T. M. Ryerson.

I will now show you here, Mr. Maffei, what appears to be the balance sheet of Pacific Empire Holdings, Inc. dated December 31, 1939, which is attached to and made a part of the minutes of the annual stockholders' meeting, found at pages 85 and 86, and I will ask you to look it over and state whether or not, to the best of your recollection, that reflects the assets and liabilities and shows the indebtedness of the company as of December 31, 1939.

A. That is correct. What is here is correct.

Q. I now desire to read into the record, may it please the Court, the following liabilities as of December 31, 1939:

(Testimony of Michael Maffei.)

“Minority stockholders’ interest, California Brotherhood Investment Company, \$208.76.

“Minority stockholders’ interest, Calitalo Investment Co., \$27,664.90.

“Accounts payable, California Pacific Service, Inc., \$1,138.33.

“Accounts payable, Sundry, \$9,745.36.

“Accounts payable, Corporation Trust Co., \$36.46.

“Notes payable, Corporation Trust Co., \$1750.

“Accounts payable, Safe Deposit Company, \$690.

“Accrued taxes payable, \$11.86.

“Subscriptions payable \$10,000.”

Might I ask if that was the Frostkraft Packing Corporation [123] stock that you bought?

A. I can’t remember.

Q. “Notes payable, Pacific Empire Corporation, \$86,019.90.

“Notes payable, Pacific National Bank, \$56,000.

“Notes payable, Joseph McInerney, \$15,000.

“Notes payable, A. J. Scampini, \$1800.”

That was the balance due on the note given to me in 1936, is it not? A. That is right.

Q. “Notes payable, W. H. Roussell, \$6700.”

Did that not represent the balance due to Mr. Roussell for the purchase of his 700 shares of preferred stock? A. Right.

(Testimony of Michael Maffei.)

Q. Which you agreed to buy at \$10 a share?

A. That is right.

Q. \$7000, and you still owed him \$6700?

A. Yes.

Q. "Notes payable, Edward Molkenbuhr, \$5955.38."

Did that not represent the balance due to Mr. Molkenbuhr for the purchase of certain shares in the Standard Transportation Corporation, which was one of your subsidiaries?

A. That is right.

Q. "Notes payable, California Baking Company, \$5300."

Wasn't that the balance due for the purchase of a block of stock in the Merchants Ice & Cold Storage Company? A. From Louis Sutter.

Q. "Notes payable, L. R. Arnold, Liquidating Agent, \$59,373.60."

A. Well, he was liquidating for the City National Bank, and I suppose that——

Mr. Naus: Could we have him leave out the "suppose"?

The Court: If he knows he may answer.

A. The Company took over some notes from the liquidating agent, which the company would have to pay.

Mr. Scampini: Q. Let me see if I can refresh your memory: Mr. Arnold, at the time the City National Bank of San Francisco [124] sold its assets to the Pacific National Bank of San Francisco, was appointed the liquidating agent for the

(Testimony of Michael Maffei.)

remainder of the assets of the City National Bank?

A. That is right.

Q. And, of course, as liquidating agent, he was liquidating the remaining assets or distributing them to the stockholders of the City National Bank in San Francisco, is that right? A. Yes.

Q. And, of course, the stockholders of the City National Bank of San Francisco included the Pacific Empire Holdings, Inc., is that right?

A. It happened to have a few shares in the City National Bank, about 10 per cent.

Q. When the City National Bank of San Francisco went into liquidation Pacific Empire Holdings had 52 per cent? A. 52.

Q. Thereafter, through Pacific Empire Corporation it picked up some more stock?

A. That is right.

Q. And increased its holding in the City National Bank of San Francisco? A. Yes.

Q. But there were still quite a few stockholders still out? A. There were a few out.

Q. The assets in the hands of the liquidating agent were borrowed by the Pacific Empire Holdings, Inc., were they?

A. There was no cash borrowed, there was no cash there.

Q. You borrowed the assets?

A. We took the notes.

Q. You executed promissory notes of the holding company?

(Testimony of Michael Maffei.)

A. Whether they got the notes, or not, I don't know.

Q. "Notes payable, Kohler & Chase, \$11,637.82."
Who were Kohler & Chase?

A. They are the landlords of the building.

Q. You had not been able to pay rent to them?

A. That is unpaid rent. [125]

Q. This represents unpaid rent? A. Yes.

Q. "Notes payable, Sundry, \$5057.60.

"Accrued interest payable, \$2075.87.

"Interest payable, L. R. Arnold, Liquidating Agent, \$3562.40."

Does that refresh your mind with respect to whether or not a promissory note had been given by the holding company to Arnold, the liquidating agent?

A. He might have had a note, or it might have been just bookkeeping, I don't know.

Q. Who was really operating and managing this set-up?

Mr. Naus: What do you mean by "this set-up"?

Mr. Scampini: Pacific Empire Holdings and Pacific Empire Corporation.

A. Both I and Arnold.

Q. Now, I desire to read into the record the minutes of the Board of Directors meeting held February 15, 1940, which are found at pages 89 to 91 of Volume 5, in which it is reported the following directors were present and acting:

(Testimony of Michael Maffei.)

M. Maffei, L. R. Arnold, A. A. Heer, Jr., Peter Bercut, Luigi Giachini, Webb Richards. Absent, T. M. Ryerson.

“The meeting thereupon proceeded with the election of officers, the following names being propoesd for the respective offices shown: M. Maffei, President, L. R. Arnold, Vice-President and Secretary, Peter Bercut, Vice-President, A. A. Heer, Treasurer.

“The chairman declared the nominations closed, thereupon, by unanimous vote of all directors present, the individuals nominated were declared elected to the respective offices shown, to hold office during the ensuing year or until their successors have been elected, with annual [126] salaries now prevailing, as set forth in minutes of previous meetings of the Board of Directors.

“Upon motion duly made, seconded and unanimously carried, the Vice-President and Secretary was authorized to use the title of Executive Vice-President, which authorization in no way alters the authority of the office of the Vice-President and Secretary, in accordance with the provisions of the by-laws.

“The Chairman announced that the election of an Executive Committee was the next order of business, thereupon the following names were proposed: M. Maffei, L. R. Arnold, Peter Bercut.

(Testimony of Michael Maffei.)

“The Chairman declared the nominations closed, thereupon, by unanimous vote of all directors present, the individuals nominated were declared elected members of the Executive Committee, to hold office during the ensuing year, or until their successors had been elected, each member, except salaried officers, to receive a fee of \$10 for each meeting.”

I now desire to read into the record the minutes of the executive committee meeting held March 8, 1940, found at page 91, together with the exhibits, ending at page 96, and in which it is reported the following members were present and acting: M. Maffei, L. R. Arnold, Peter Bercut.

“The secretary read the minutes of the Executive Committee meeting held on the 30th day of September, 1939, which by motion duly made, seconded and unanimously carried, were approved as read.

“In accordance with the resolution adopted at the meeting of the Executive Committee held on the 3rd day of [127] January, 1939, the President and the Executive Vice-President reported upon the results of negotiations carried on with Joseph McInerney, in connection with the settlement of the obligations owing to him by the corporation.

“After considerable negotiations, arrangements had been made whereby the corporation is able to discharge its obligations by transfer-

(Testimony of Michael Maffei.)

ring to Joseph McInerney title to a 47½ per cent interest in California Pacific Service, Inc.; the corporation to retain an equal interest, and 5 per cent of the stock to be placed in a 21-year voting trust.”

Now, Mr. Maffei, as a result of this transaction the Pacific Empire Holdings, Inc. became a minority stockholder in California Pacific Service, Inc., is that right? A. That is right.

Q. Now, before authorizing that transaction, Mr. Maffei, you deemed it advisable and prudent to call a special meeting of the Executive Committee to authorize it, didn't you?

A. Well, I think that we had the meeting——

Q. “Yes” or “No”, did you or did you not deem it advisable?

A. I don't know whether I called it before or after.

Q. If it was before, you deemed it advisable to call this special meeting of the Executive Committee to pass upon it?

Mr. Naus: One moment, that is objected to as conjectural and argumentative.

The Court: The objection will have to be sustained.

Mr. Scampini: I note here on page 93 the following statement, which I will read into the record:

“The Executive Vice-President reported at length upon the sale of 280 shares of stock of Pacific National Bank of San Francisco by

(Testimony of Michael Maffei.)

Pacific Empire Corporation, at \$125 per share, credit for the proceeds having been received by the [128] corporation as of December 30, 1939 and loaned to this corporation.”

In other words, if I construe these minutes correctly, and I am asking you for your knowledge and best recollection, 280 shares of the stock of the Pacific National Bank of San Francisco had been sold by Pacific Empire Corporation at \$125 a share.

A. Right.

Q. To Mr. Gaither, of the Pacific National Bank?

A. That is right.

Q. And the proceeds were received on December 30, 1939, by Pacific Empire Corporation, is that right?

A. That is right.

Q. And by the Pacific Empire Corporation, in turn, loaned to Pacific Empire Holdings?

A. Yes.

Q. Who caused the loan to be made from one to the other?

A. I think the sale was made to help the Merchants Ice & Cold Storage Company.

Q. You were president of both companies?

A. Yes.

Q. And the loan was made by one to the other?

A. That is the only way we could get our money.

Q. I notice you also state here,

“The President reported that the 280 shares of stock of Pacific National Bank sold, had cost Pacific Empire Corporation \$..... per

(Testimony of Michael Maffei.)

share, and the sale at \$125 was effected by Pacific Empire Corporation at the rest of Pacific Empire Holdings, Inc., in order that additional loans could be made by Merchants Ice & Cold Storage Company.”

Is that a true statement of the circumstances under which those shares were sold?

A. It must be if it is in the minutes.

Q. I am asking, is that a true statement of the circumstances?

A. That is what the loans were for.

The Court: We will take a short recess.

(Recess.) [129]

Mr. Scampini: Q. During the morning session I asked you the question whether Mr. Bercut, to your knowledge and best recollection, was ever a director of California Pacific Service, Inc., and you said you did not think so, if I remember correctly.

A. I don't remember his being one.

Q. I will ask you to take a look at this book and see if you recognize it.

A. He was a director.

Q. He was a director of Pacific Service, Inc.?

A. Yes.

Q. Is that his signature at the bottom of the minutes? A. Yes.

Q. On page 270? A. Yes.

Q. To your knowledge it is?

A. I think it is.

Q. That is your signature on there, isn't it?

(Testimony of Michael Maffei.)

A. It sure is.

Mr. Naus: Has that been marked for identification?

Mr. Scampini: I am merely asking him whether he was a director in California Pacific Service, Inc.

Mr. Naus: If it is something in the nature of a minute book exhibited to the witness and he is asked a few questions about it, I think it should be marked for identification, so it can be examined.

Mr. Scampini: In the interest of time, I will offer this as our next exhibit in order, the minute book of California Pacific Service, Inc., Volume 1, and ask that the minutes of the special meeting of the board of directors found on pages 70 to 75, inclusive, be marked Plaintiff's Exhibit 14 for Identification.

(The document referred to was marked "Plaintiff's Exhibit 14 for Identification.")

I now desire to read into the record the minutes of the Executive Committee meeting of the Pacific Empire Holdings, Inc., held October 17, 1940, found on pages 100 and 101 of Volume 5 of the minutes at which it is reported that the following [130] members were present and acting: M. Maffei, L. R. Arnold, Peter Bercut, and ask you whether or not your signature appears on these minutes at the bottom, Mr. Maffei.

A. That is right.

Q. And Mr. Arnold's? A. Yes.

Q. Mr. Bercut is not there? A. Right.

Q. Was Mr. Bercut a director at that time?

(Testimony of Michael Maffei.)

A. What year was that?

Q. October, 1940.

A. To my recollection, he was.

Q. Was he a member of your executive committee? A. At the same time, yes.

Q. And you would not say the minutes did not reflect the truth? A. No.

Q. You won't say they are true and correct?

A. That is right.

Q. You would not say that he was present if he was not, would you? A. I would not.

Q. You would not? A. No.

Q. I now desire to read into the record the minutes of the special meeting of the Board of Directors of Pacific Empire Corporation, also held October 17, 1940, at which it is reported that the following directors were present and acting: M. Maffei, A. A. Heer, Jr., Webb Richards, L. R. Arnold, Peter Bercut. I will ask you whether or not that is your signature at the bottom of the page.

A. Yes.

Q. And is that the signature of A. A. Heer, Jr., Secretary? A. Yes.

Q. Was Mr. Bercut a director of Pacific Empire Corporation on that date, to the best of your knowledge and recollection?

A. To my best knowledge he was.

Q. You would not say he was not, would you?

A. No.

(Testimony of Michael Maffei.)

Q. You would not say he was present if he was not? A. No. [131]

Q. Was Mr. Bercut at that time a director of the Pacific National Bank of San Francisco?

Mr. Naus: What time?

Mr. Scampini: October 17, 1940.

A. He was.

Q. Would you state the circumstances under which Mr. Bercut became a director of the Pacific National Bank of San Francisco, if you know?

A. Well, Mr. Bercut liked to be a director of the bank, and I spoke to Mr. Gaither when the election came on in January and they put him on.

Q. Were you a director of the bank at that time? A. I was.

Q. You also were president, of course, of Pacific Empire Corporation, were you not?

A. That is right.

Q. And Pacific Empire Corporation owned about 770 shares of the bank at that time?

A. That is right.

Q. And from your holdings in the bank owned by Pacific Empire Corporation you had the means of causing Mr. Bercut to be elected?

A. Correct.

Q. You caused him to be elected as a director of the bank because he was one of the managing officers of the company, wasn't he?

A. He made a good director.

Mr. Naus: You say there were 771?

(Testimony of Michael Maffei.)

Mr. Scampini: There were originally fifteen hundred and some odd.

Mr. Naus: I thought there were 280 shares and 441 shares mentioned.

Mr. Scampini: 280 and 441 and there were some odds and ends; there were 771 altogether.

Q. Now, Mr. Maffei, was Mr. Bercut a director in Merchants Ice & Cold Storage Company on October 17, 1940?

A. In 1940, I think he was. [132]

Q. You were president and a director of Merchants Ice & Cold Storage Company, were you not?

A. Yes.

Q. Of course, the controlling interest in Merchants Ice & Cold Storage Company was in the Pacific Empire Holdings? A. That is correct.

Q. Who caused Mr. Bercut's election on the board of directors, if you know?

A. Who caused it—Mr. Bercut liked to become a director, so I suggested putting him on.

Q. Whose place did he take, do you recall? Did he take Mr. Roussell's place?

A. I think he did.

Q. Was Mr. Will S. Morse a director of the Merchants Ice & Cold Storage Company in October, 1940?

A. I think he was chairman of the board of directors.

(Testimony of Michael Maffei.)

Q. And Mr. Morse was formerly president of the Bank of America? A. Yes.

Q. He had been chairman of the Merchants Ice & Cold Storage Company for some years, had he not? A. Yes, he had been for a year or two.

Q. A year or two before this date of October 17, 1940?

A. He became director after Sherman got out.

Q. Did he not represent the bondholders' trustee?

A. Right.

Q. And he acted as a director?

A. That is right.

Q. Was Mr. Arnold the vice-president of the Merchants Ice & Cold Storage Company on October 17, 1940?

A. Mr. Arnold became president right after Mr. Sherman died.

Q. When did Mr. Sherman die?

A. I can't remember the date.

Q. Was it 1938 or 1939?

A. I think it was 1938 or 1939.

Q. He was president, to your best recollection, on October 17, 1940, wasn't it?

A. To the best of my recollection, yes. [133]

Q. As vice-president and director of the Merchants Ice & Cold Storage Company you had occasion to see and approve all financial reports and letters which were sent out to the stockholders of the Merchants Ice & Cold Storage Company after the annual meetings?

A. It was by order of all the directors.

(Testimony of Michael Maffei.)

Mr. Scampini: Mr. Brownstone, I asked you to produce the letters sent out to the stockholders and the annual reports of 1936, 1937, 1938, 1939, 1940 and 1941 and 1942.

Mr. Brownstone: There they are.

Mr. Scampini: Q. Now, you said prior to the recess, Mr. Maffei, in connection with my inquiry with respect to the amount of the investment made in Frostkraft Packing Corporation that you thought it was only about one or two thousand dollars.

A. That is my recollection, yes.

Q. I show you here a financial report that you sent out to your stockholders of May 31, 1939, which I have already read into evidence, and concerning which you have testified, and I note here that the assets include capital stock of Frostkraft Packing Corporation, \$10,000.

A. We signed up for \$10,000, but I do not think we took it all.

Q. Note B, referring to Frostkraft Packing Corporation, says,

“The capital stock of Frostkraft Packing Corporation is of \$10 par value. The investment in this stock is carried at cost.”

Is that what it cost the Pacific Empire Holdings, \$10,000?

A. If they bought that much, yes.

Mr. Naus: What page is that on?

Mr. Scampini: Page 78, Volume 5, mailed to stockholders May 31, 1939.

Q. Now, referring again to the balance sheet of

(Testimony of Michael Maffei.)

Pacific Empire [134] Holdings, Inc., dated December 31, 1939, which is part of the annual stockholders' meeting of the company held on February 15, 1940, and which is found on pages 85 and 86 of Volume 5 of the minute book of said company, and concerning which you have already testified, I notice that in the liabilities which are listed in the record, there is no liability shown on December 31, 1939, of Merchants Ice & Cold Storage Company. At that time was Pacific Empire Holdings, Inc., or Pacific Empire Corporation indebted to Merchants Ice & Cold Storage Company?

A. What date?

Q. December 31, 1939.

A. I could not guarantee yes or no.

Q. I notice here on the assets side that you have accounts receivable, Merchants Ice & Cold Storage Company, \$13,636, and liabilities do not show anything. A. I guess that is right, then.

Q. At the end of the year 1939 the Holding Company had money coming from the Merchants Ice & Cold Storage Company?

A. Correct, according to the minute book.

Q. Now, Mr. Maffei, on or about November 20, 1940, in an action which had been instituted by the United States for the collection of these taxes, that the minutes indicate, concerning which you have already testified, and which action is entitled, "United States of America, Plaintiff, vs. Pacific Empire Holdings, Inc., a Delaware corporation,

(Testimony of Michael Maffei.)

In the Southern Division of the United States District Court for the Northern District of California, Case No. 21,140-W'' was there a judgment obtained in favor of the United States against the holding company for the sum of \$11,942.80?

A. I think so.

Mr. Naus: If your Honor please, I think the Clerk of the Court could answer that better than this witness.

Mr. Scampini: I offer this in the record as part of our [135] record, and ask that the Clerk verify that.

Mr. Naus: What is that amount?

Mr. Scampini: \$11,942.80.

Q. When that judgment was entered, Mr. Maffei, it was a sort of bombshell, was it not?

A. It was a bombshell to us.

Q. I notice in the liabilities concerning which you have testified, as of December 31, 1939, there is no inclusion on the liability side of any indebtedness to the United States of America, is that right?

A. Maybe the judgment was not out.

Q. In other words, the judgment came sort of unexpectedly, did it not?

A. That is right.

Q. What did the company have to pay this judgment, if anything?

A. It did not have anything.

Q. Well, it had this block of stock of the Merchants Ice & Cold Storage Company?

A. Right?

Q. What, if anything, did you do toward dis-

(Testimony of Michael Maffei.)

charging this judgment? Did you ever pay the judgment? Did the company ever pay the judgment? A. Not to my knowledge.

Q. Now, Mr. Maffei, you had just sent out a report, a financial report on November 20, 1940—you had just sent out another report and letter to your stockholders, had you not? A. In 1940?

Q. Yes. I will ask you to take a look at that.

A. I think this report was printed, but I don't think it went out.

Q. Are you certain it did not go out, Mr. Maffei?

A. This is the report of 1939.

Q. Was that mailed or put out?

A. The first part of 1940.

Q. The letter is dated June 30, 1940.

A. Whatever it is.

Q. Was it mailed after June 30, 1940, to your best recollection?

A. It was mailed when it was returned.

Q. Now, I notice, here, that you told your stockholders the [136] following:

“Merchants Ice & Cold Storage Company: The company, during the year 1939, enjoyed its largest volume of business since the year 1937, realizing during that period \$65,381.05 of net profits from operations and before depreciation charges, representing the largest cash net income during many recent years included in its history of operation. Throughout the year, the company's condition became more

(Testimony of Michael Maffei.)

sound and its net current position improved by approximately \$65,000."

Is that correct? A. Yes.

Q. You were a vice-president and director of Merchants Ice & Cold Storage Company?

A. That is correct.

Q. You knew that to be a fact, didn't you?

A. That is right.

Q. "The improved condition of the corporation was accomplished even though, effective October 31, 1939, the management, after long negotiations, was compelled to grant an increase in the wage scale for the majority of its employees, which will ultimately result in increased labor cost of approximately \$15,000 annually."

Is that correct? A. Yes.

Q. Now, you are speaking from personal knowledge as a result of your position as vice-president and director of Merchants Ice & Cold Storage Company? A. Right.

Q. "This development, together with the existing high interest rate on its bonded and other indebtedness, greatly reduces the net cash profits being earned by the company. Constant progress is being made toward remedying these latter conditions.

"As set forth in this and preceding balance sheets [137] of your corporation, the investment in the controlling stock of Merchants Ice &

(Testimony of Michael Maffei.)

Cold Storage Company constitutes your corporation's largest investment."

A. That is right.

Q. That was correct, was it not? A. Yes.

Q. According to the balance sheet, which is found as a part of the letter you say the stock was valued at \$545,906.81, for the common stockholding and \$123,456.66 for the preferred stockholding.

A. Correct.

Q. Those values were arrived at from the auditor's statement of Haskins & Sells of Merchants Ice & Cold Storage Company? A. Correct.

Q. Were those values which you placed on the balance sheet of the Pacific Empire Holdings, Inc., in your opinion, a fair and reasonable value of those shares of the Merchants Ice & Cold Storage Company? A. That is right.

Q. I ask you, in your opinion, whether or not that represents a fair and true value of those shares in the possession of the Pacific Holdings.

A. Yes, that is what I would say.

Q. Did it represent, in your opinion, the fair, true and reasonable value of this block of shares?

A. Yes.

Q. As of June 30, 1940? A. Correct.

Q. You further state,

"Consequently, all steps which have been taken since the reorganization to date, have been pointed toward placing this investment on a dividend basis. It is the opinion of the man-

(Testimony of Michael Maffei.)

agement that after the elapse of another year's operation, the financial condition of Merchants Ice & Cold Storage Company will be such as to permit the company to work out certain financial readjustments affecting its bonded indebtedness and capital structure, whereby the payment of dividends will be [138] made possible consistent with the net income which may be realized. Your corporation should then profit materially."

When you made that statement to your stockholders, Mr. Maffei, as president of the Pacific Empire Holdings, Inc., and as vice-president and director of Merchants Ice & Cold Storage Company, of which company Mr. Arnold, who also signed that statement, was president, did you in good faith, from your knowledge acquired from the operations of Merchants Ice & Cold Storage Company, and knowing the condition of the company, truly and fairly and reasonably believe that the company perhaps in the following year could come to a dividend basis?

A. If they improved their condition I think they would.

Q. For that reason you stated to your stockholders further as follows:

"As evidenced by the accompanying balance sheet, the management continues to increase its holdings in the stock of Merchants Ice & Cold

(Testimony of Michael Maffei.)

Storage Company whenever the occasion warrants, thus improving its equity position, accordingly. This policy prevails toward any investment of your corporation, whenever it is possible to increase its majority holdings.”

A. Yes.

Q. The company already owned substantially more than 60 per cent of the outstanding common stock of Merchants Ice & Cold Storage Company?

A. Right.

Q. It owned approximately 30 per cent or $33\frac{1}{3}$ per cent of the outstanding preferred stock, isn't that right?

A. That is right.

Q. You had more than 60 per cent of the voting power?

A. Yes.

Q. And yet you were continuing to add to the portfolio, weren't [139] you?

A. Yes.

Q. Why did you do so?

A. Because I thought it was worth it.

Mr. Scampini: I now offer in evidence as our exhibit next in order the financial report sent out to the stockholders of Pacific Empire Holdings, Inc., dated June 30, 1940.

The Court: It may be admitted, and marked.

(The document was marked “Plaintiff's Exhibit 15.”)

(Testimony of Michael Maffei.)

PLAINTIFF'S EXHIBIT No. 15

PACIFIC EMPIRE HOLDINGS

Incorporated

26 O'Farrell Street

San Francisco

June 30, 1940

To the Stockholders of

Pacific Empire Holdings, Incorporated:

This is the annual report of the management, covering the operation of your corporation for the year 1939, accompanied by the Consolidated Balance Sheet of the corporation at the close of business, December 31, 1939, as prepared by the Treasurer.

Merchants Ice and Cold Storage Company: The company, during the year 1939 enjoyed its largest volume of business since the year 1937, realizing during that period \$65,381.05 of net profits from operations and before depreciation charges, representing the largest cash net income during many recent years included in its history of operation. Throughout the year, the company's condition became more sound and its net current position improved by approximately \$65,000.00. The improved condition of the corporation was accomplished even though, effective October 31, 1939, the management, after long negotiations, was compelled to grant an in-

(Testimony of Michael Maffei.)

crease in the wage scale for the majority of its employees, which will ultimately result in increased labor costs of approximately \$15,000.00 annually. This development, together with the existing high interest rate on its bonded and other indebtedness, greatly reduces the net cash profits being earned by the company. Constant progress is being made toward remedying these latter conditions.

As set forth in this and preceding Balance Sheets of your corporation, the investment in the controlling stock of Merchants Ice and Cold Storage Company constitutes your corporation's largest investment. Consequently, all steps which have been taken since the reorganization to date, have been pointed toward placing this investment on a dividend basis. It is the opinion of the management that, after the elapse of another year's operation, the financial condition of Merchants Ice and Cold Storage Company will be such as to permit the company to work out certain financial readjustments affecting its bonded indebtedness and capital structure, whereby the payment of dividends will be made possible consistent with the net income which may be realized. Your corporation should then profit materially.

Frostercraft Packing Corporation: The acquisition of a substantial interest in Frostercraft Packing Corporation was previously included in the Balance Sheet for the year 1938. This acquisition was prompted by the opinion of the management of your corporation than an entry into the production of

(Testimony of Michael Maffei.)

frosted foods was not only opportune from the standpoint of your corporation, but a constructive step in a field which should prove highly valuable and profitable to Merchants Ice and Cold Storage Company. The development of this corporation, during the year 1939, has reached the point whereby it is looked upon as one of the ten better nationally known companies producing and distributing frosted foods. While the company has not yet progressed sufficiently since its organization to produce profits, nevertheless, it has already proven itself to be a valuable tenant and customer to Merchants Ice and Cold Storage Company.

Other Holdings and Investments: During the year 1939 there were no changes in your corporation's holdings in the stock of Pacific Empire Corporation, the bank stock holding company, excepting, however, that during the year, Pacific Empire Corporation disposed of 280 shares of its holdings of the capital stock of Pacific National Bank of San Francisco. The proceeds of this sale were utilized for the purpose of making additional loans to Merchants Ice and Cold Storage Company and to reduce the corporation's obligations owing to banks. The corporation continues to carry in its investments substantial holdings in the stock of Pacific National Bank, as reflected by the accompanying Consolidated Balance Sheet.

The investment in the stock of California Pacific Service, Incorporated continues to prove extremely profitable. The corporation, which operates princi-

(Testimony of Michael Maffei.)

pally the Family Service Laundry at Bakersfield, California, enjoyed a gross volume of business for the year 1939 of \$96,502.43. As heretofore reported, the operation of these properties has netted your corporation attractive annual profits consistently, since the acquisition of the stock of that company.

General: During the year under discussion, total liabilities of the corporation have been reduced by \$53,581.82, including the reduction of \$37,563.00 of notes payable to banks. Also during the year, even further economies have been effected by the management in general administrative and operating expense, with the result that the total expenditures of the corporation and consolidated subsidiaries, other than interest paid on obligations, equalled \$8,633.20. This figure represents a further reduction of overhead costs including all administrative charges and executive salaries of \$4,517.95.

The management, during the year, negotiated the cancellation of the lease on the premises occupied by the corporation and the change in the location of their offices, which will result in an annual saving of \$4,110.00.

As evidenced by the accompanying Balance Sheet, the management continues to increase its holdings in the stock of Merchants Ice and Cold Storage Company whenever the occasion warrants, thus improving its equity position, accordingly. This policy prevails toward any investment of your corporation, whenever it is possible to increase its majority holdings.

(Testimony of Michael Maffei.)

In concluding the report covering the 1939 operation of the corporation, the management wishes to state that the condition of the corporation and its controlled operating companies, has been greatly improved during these recent years, and further, that its foundation is sound to the end that the stockholders should ultimately benefit therefrom.

Respectfully submitted,

BY ORDER OF THE BOARD OF
DIRECTORS,

M. MAFFEI,

President.

L. R. ARNOLD,

Executive Vice-President.

(Testimony of Michael Maffei.)

PACIFIC EMPIRE HOLDINGS
Incorporated

CONSOLIDATED BALANCE SHEET

as of December 31, 1939

After giving effect to adjustments to reflect the estimated fair or liquidating
value of all assets owned by the Company

Assets

Investments:

Capital Stock of Pacific National Bank.....	\$ 82,176.65 (A)
Preferred Stock of Merchants Ice and Cold Storage Company.....	123,456.66
Common Stock of Merchants Ice and Cold Storage Company.....	545,906.81 (B)
Common Stock of Frosteraft Packing Corporation.....	10,000.00 (C)
Capital Stock of California Pacific Service, Inc.....	86,582.40 (D)

Total Investments.....\$848,122.52

Cash on Hand and in Banks.....	6,677.89
Notes and Accounts Receivable, Less Reserve.....	33,387.26
Other Stock and Securities.....	10,197.85
Printing Plant; Furniture and Fixtures, Less Reserve for Depreciation.....	236.53

\$898,622.05

(Testimony of Michael Maffei.)

Liabilities

Notes Payable, Banks.....	\$ 46,000.00 (E)
Other Notes Payable.....	14,880.00 (E)
Notes and Contracts Payable, Long Term Installment.....	56,858.20 (E)
Accounts Payable	14,145.45 (E)
Reserve for Contingencies.....	15,000.00 (F)
Reserve for State Franchise and Federal Income Taxes.....	410.59
Minority Stockholders Interest in Capital Stock of Subsidiary Corporations....	123,335.33
Capital Stock and Surplus:	
Capital Stock Authorized.....	5,000,000 Shares
Capital Stock Issued.....	2,560,996 Shares
Less: Treasury Stock.....	24,535 Shares
Outstanding	2,536,461 Shares
Surplus, Capital (Consolidated)	378,157.75
	627,992.48
	<u>\$898,622.05</u>

(Testimony of Michael Maffei.)

- (A) Valuation based upon the value stated by the published statement of condition of Pacific National Bank of San Francisco, as of December 31, 1939.
- (B) Valuation based upon the value stated by the audited balance sheet of Merchants Ice and Cold Storage Company, as of December 31, 1939, as prepared and certified to by Messrs. John F. Forbes & Company, Certified Public Accountants, excepting 13,000 shares of stock, which are carried at \$2.50 per share.
- (C) The investment in the stock of Frostrcraft Packing Corporation is carried at cost.
- (D) The capital stock of California Pacific Service, Inc., represents the ownership of all the business, properties and equipment of Family Service Laundry, located at Bakersfield, California, carried at the valuation placed on these properties and business as of August 1, 1935, by Messrs. Kelly & Son, Appraisers, Bakersfield, California, adjusted according to the balance sheet of the company as of December 31, 1939.
- (E) Represents mainly the balances owing on obligations previously contracted on account of claims settled by the present management. Also included therein are obligations totaling \$15,300.00 contracted on account of new acquisitions.

(Testimony of Michael Maffei.)

(F) This amount has been set aside from the Surplus Account under advice of Counsel, as a reserve for possible losses which may be realized by the corporation on account of claims pending against it for additional revenue stamp taxes, attributable to the acquisition, by foreclosure proceedings, of the laundry properties, during the year 1934.

Note: The Corporation is contingently liable to Messrs. Kohler & Chase on account of the lease on the premises occupied by the company and subsidiaries at 26 O'Farrell Street, San Francisco, California, and to the Pacific National Bank of San Francisco, for the amount of \$50,000.00, as Guarantor on notes of Merchants Ice and Cold Storage Company.

Certification

Board of Directors and Stockholders

Pacific Empire Holdings, Incorporated:

The foregoing Consolidated Balance Sheet of Pacific Empire Holdings, Incorporated and Subsidiaries, has been prepared by the undersigned in accordance with instructions, for the purpose of conveying to the Board of Directors and Stockholders, the fair valuation of the Corporation's investments, based upon the information available, as in the opinion of the undersigned, appears proper. All items included in the Balance Sheet have been stated at the estimated fair or liquidating value, in accordance with the comment included in the Statement.

(Testimony of Michael Maffei.)

Based upon the conditions herein set forth, and included in the foregoing Balance Sheet as of December 31, 1939, it is certified that in the opinion of the undersigned, the financial condition of Pacific Empire Holdings, Incorporated and Subsidiaries, is fairly and correctly reported.

A. A. HEER, JR.,
Treasurer

San Francisco,

June 15, 1940.

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22339R. Plfs. Ex. No. 15. Filed 4-21-43. Walter B. Maling, Clerk. By J. P. Welsh, Deputy Clerk.

Mr. Scampini: Q. In Pacific Empire Holdings, Inc., you had created, had you not, a voting trust?

A. That is right.

Q. Sometime in the year 1936?

A. That is correct.

Q. And the voting trust was for the purpose of assuring the continued management and control of the company? A. That is right.

Q. You had issued to those who consented to the voting trust a voting trust certificate?

A. That is correct.

Q. I will now show you what appears to be a voting trust certificate for the common stock of the Pacific Empire Holdings, Inc., to Maurice L. Boulanger for 4100 shares, and ask you whether or not that is one of the voting trust certificates.

(Testimony of Michael Maffei.)

A. That is right.

Q. Among the voting trustees are the names of Mr. Bercut, yourself and Mr. Arnold?

A. Yes.

Mr. Naus: Will you have those statements which were given you marked for identification?

Mr. Scampini: Very well.

Balance sheet Merchants Ice & Cold Storage Co. of August 4, 1939, was marked "Plaintiff's Exhibit 16 for Identification."

(Balance sheet Merchants Ice & Cold Storage Co. of June 15, 1940, was marked "Plaintiff's Exhibit 17 for Identification.")

(Balance sheet of Merchants Ice & Cold Storage Co. of [140] February 19, 1942, was marked "Plaintiff's Exhibit 18 for Identification.")

(Balance sheet Merchants Ice & Cold Storage Co. of February 19, 1941, was marked "Plaintiff's Exhibit 19 for Identification.")

(Voting trust certificate for the common stock of Pacific Empire Holdings, Inc. was marked "Plaintiff's Exhibit 20.")

(Testimony of Michael Maffei.)

PLAINTIFF'S EXHIBIT No. 20

Number

10

Shares

—4,100—

VOTING TRUST CERTIFICATE
FOR THE COMMON STOCK

of

PACIFIC EMPIRE HOLDINGS
INCORPORATED

Incorporated Under the Laws of the
State of Delaware

This certifies that Maurice L. Boullanger has deposited Four Thousand One Hundred shares of the above named company, Pacific Empire Holdings, Incorporated, of the par value of Ten Cents (\$.10) each, with the Trustees, under an agreement between M. Maffei, L. R. Arnold, A. A. Heer, Jr., Peter Bercut, James Bernardini, Luigi Giachino and George W. Hope as Trustees, and certain stockholders of the said company, bearing date, the Second day of March, 1936. This certificate and interest represented thereby is transferable only on the books of said Trustees upon the presentation and surrender hereof. The holder of this certificate takes the same, subject to all of the terms and conditions of the aforesaid agreement between the Trustees and certain stockholders of said company, Pacific Empire Holdings, Incorporated, and becomes a party to the said agreement and is entitled to the benefits thereof.

(Testimony of Michael Maffei.)

In Witness Whereof, the Trustees have caused this certificate to be signed this Twentieth day of October, 1936, by the Signatory Trustees thereunto duly authorized.

M. MAFFEI

Trustee

L. R. ARNOLD

Trustee

For Value Received.....hereby sell, assign and transfer unto.....shares of the capital stock represented by the within certificate and do hereby irrevocably constitute and appoint.....attorney to transfer the said stock on the books of the within named Corporation with full power of substitution in the premises.

Dated.....

MAURICE L. BOULLANGER

In Presence of

A. A. HEER

Notice: The signature of this assignment must correspond with the name as written upon the face of the certificate, in every particular, without alteration or enlargement, or any change whatever.

[Endorsed]: U. S. D. C. N. D. Cal. No. 22339R.
Filed 4-21-43. Walter B. Maling, Clerk. By J. P. Welsh, Deputy Clerk.

(Testimony of Michael Maffei.)

Q. In Pacific Empire Corporation, in order to assure continued management you had caused to be solicited and obtained from the stockholders certain proxies, had you not? A. That is right?

Q. I show you here one of the proxies and ask you whether or not that is one of the proxies which was used in the course of soliciting the proxies and voting rights. A. That is right.

Q. I see that Mr. Maffei, Mr. Arnold and Mr. Bercut were the proxies named to vote the proxies of the stockholders. A. That is right.

Q. By means of these proxies you would manage and control the action of the board?

A. That is right.

Mr. Scampini: I offer in evidence the proxy as Plaintiff's Exhibit 21.

(The proxy was marked "Plaintiff's Exhibit 21.")

PLAINTIFF'S EXHIBIT No. 21

PROXY

PACIFIC EMPIRE CORPORATION

(A California Corporation)

Know All Men by These Presents, That the undersigned stockholder of Pacific Empire Corporation, a corporation, does hereby constitute and appoint M. Maffei, L. R. Arnold and Peter Bercut, and each of them, the true and lawful attorneys,

(Testimony of Michael Maffei.)

agents and proxies of the undersigned, with full power of substitution, for and in the name, place and stead of the undersigned, to vote the shares of Pacific Empire Corporation, a corporation, now or at any time held or owned by the undersigned or standing in the name of the undersigned on the books of said Corporation, at any annual or special meeting of the stockholders of said Corporation, and at any and all adjournments thereof, on any matter, resolution, motion, election or proposition coming before such meeting or adjournment thereof, of which may be submitted to, considered at or acted or passed upon by, such meeting, including election of directors, amendment of certificate of incorporation of by-laws, and any other corporate act requiring the authorization of stockholders, as fully as the undersigned could do if personally present and acting, hereby ratifying and confirming all that said attorneys, agents or proxies may do by virtue hereof.

A majority of all or any of said attorneys, agents and proxies who shall be present and shall act at the meeting (or if only one shall be present, then that one), shall have and may exercise all of the powers of said attorneys, agents and proxies hereunder.

All former proxies are hereby revoked, and this proxy shall continue in full force and effect for a period of three years from date.

(Testimony of Michael Maffei.)

In Witness Whereof: the undersigned has hereunto set his hand this 28th day of November, 1939.

HENRY J. BUDDE

Signature of Stockholder.

Signed in the presence of:

ERNEST O. JONES

Witness.

N. B. This proxy must be witnessed.

Henry J. Budde

45 Hartford St., S. F.

[Endorsed]: U. S. D. C. N. D. Cal. No. 22339R.
Filed 4-21-43. Walter B. Maling, Clerk. By J. P. Welsh, Deputy Clerk.

Q. What, if anything, happened to this block of stock of the Merchants Ice & Cold Storage Company, owned by the company, on November 20, 1940?

A. It was sold to Mr. Bercut.

Q. When was it sold to Mr. Bercut?

A. Sometime in the last part of 1940.

Mr. Scampini: Mr. Brownstone, might I now ask that you produce the original agreement between Mr. Bercut and Pacific Empire Holdings, Inc., dealing with the purchase of these shares?

Mr. Brownstone: Yes.

Mr. Scampini: Counsel has just handed to me what purports [141] to be a letter addressed to Mr. Peter Bercut, 739 Market Street, San Francisco,

(Testimony of Michael Maffei.)

California, dated January 8, 1941, and I will ask you to look at it and ask you whether you remember it. It is signed by you as president and by Mr. Arnold as secretary. A. Yes.

Q. Did you ever see the other duplicate original of this letter? A. I never did.

Q. Do you know whether Mr. Bercut ever accepted the agreement? I do not see his signature there.

A. I don't know. After I signed it I never saw it afterward.

Q. You have never seen the original of this document after signing this?

A. Not after signing.

Q. Did you sign one, or two, or three?

A. I don't remember.

Q. But as far as you know have never been able to find in the office or the files a duplicate of this?

A. No, I never did.

Mr. Scampini: I now offer in evidence as our next exhibit in order a letter addressed to Mr. Peter Bercut under date of January 8, 1941, which purports to be signed by Pacific Empire Holdings, Inc., by M. Maffei, President, by L. R. Arnold as Secretary. In the left-hand corner it states: "Agreed and accepted," with a line for signature, and in typewriting, "Peter Bercut," but the signature of Peter Bercut apparently is not here. I will ask that it be marked "Plaintiff's Exhibit" next in order.

(Testimony of Michael Maffei.)

(The document was marked

“PLAINTIFF’S EXHIBIT 22.”)

Mr. Scampini: I now desire to read this into the record, may it please the Court. The letter appears to be on a plain letterhead. It is dated January 8, 1941:

“Mr. Peter Bercut
739 Market Street
San Francisco, California [142]

“Dear Mr. Bercut:

“The following will confirm our understanding and agreement relating to the sale to you by this corporation, Pacific Empire Holdings, Inc., of the controlling shares of stock of Merchants Ice & Cold Storage Company, now owned by this corporation.

“The purchase price, as agreed to be paid by Peter Bercut, is \$35,000.00, for which it is agreed that Peter Bercut is to receive, in accordance with the following conditions, the total of 78,358 shares of stock of Merchants Ice and Cold Storage Company, consisting of 12,495 shares of Preferred stock and 65,863 shares of Common stock.

“It is agreed by this corporation that out of the proceeds of this sale, to-wit, \$35,000.00, the sum of \$25,000.00 will be paid by this corporation to Merchants Ice and Cold Storage Company. Out of the balance remaining the sum of

(Testimony of Michael Maffei.)

\$6,000.00 is to be remitted to Pacific National Bank, in order to secure the release from them of all stock of Merchants Ice and Cold Storage Company now on pledge as security for the obligations of the corporation to Pacific National Bank.

“It is further understood and agreed that 5,516 $\frac{2}{3}$ shares of Preferred stock of Merchants Ice and Cold Storage Company, now held by California Baking Company as security for the balance owing by the corporation of \$4100.00 is to be delivered to Peter Bercut when this obligation is paid.

“It is understood and agreed by Peter Bercut that the corporation shall have the option to purchase, at 50¢ per share, all or any part of 20,000 shares of Common stock of Merchants Ice and Cold Storage Company within two years [143] from date hereof. It is understood that the corporation may obtain delivery of any portion of the 20,000 shares as paid for, from time to time, within the said two year period. It is further understood and agreed, in this connection, that all of the voting rights on the said 20,000 shares herein referred to shall remain with Peter Bercut for a period of seven years from date hereof, whether or not the said 20,000 shares are purchased by the corporation. All rights and privileges of Pacific Empire Holdings, Inc., in connection with the 20,000

(Testimony of Michael Maffei.)

shares of Common stock, hereinabove referred to are not assignable.

“Yours very truly,

“PACIFIC EMPIRE HOLDINGS,
INCORPORATED

[Seal] “By M. MAFFEI, Pres.

“By L. R. ARNOLD, Secy.

“Agreed and Accepted:

Peter Bercut.”

Q. Now, Mr. Maffei, this 65,863 shares of common stock and 12,495 shares of preferred stock, in the aggregate, were all of the shares owned by Pacific Empire Holdings, Inc., or any of its subsidiaries in Merchants Ice & Cold Storage Company? A. Right.

Q. Who conducted this transaction with Mr. Bercut? A. Mr. Arnold.

Q. What did you have to do with it?

A. Mr. Arnold was going to contact him and make a deal.

Q. Did you conduct negotiations with Mr. Bercut?

A. I talked to Mr. Bercut once in the office about three minutes, and that was all. [144]

Q. At that time was Mr. Bercut a director and vice-president of the Pacific Empire Holdings, Inc.?

A. Yes.

(Testimony of Michael Maffei.)

Q. Was he a director of Pacific Empire Corporation? A. To my best knowledge he was.

Q. Was he a director of Merchants Ice & Cold Storage Company? A. Yes.

Q. Was he a director of the Pacific National Bank? A. That is right.

Q. Now, out of the \$35,000 received, \$25,000 was given to the Merchants Ice & Cold Storage Company? A. Correct.

Q. And \$6000 went to the Pacific National Bank of San Francisco? A. That is right.

Q. There was \$4000 left. A. Yes.

Q. What did the Pacific Empire Holdings, Inc. have as assets after this transaction?

A. They did not have much of anything.

Q. To your knowledge, Mr. Maffei, were the liabilities of the Pacific Empire Holdings, Inc. substantially the same liabilities as are enumerated in the minute book on the balance sheet of December 31, 1939, which are enumerated on page 86, Volume 5 of the Minute Book of the Pacific Empire Holdings, Inc.?

A. I think the debts were higher than that.

Q. In other words, the liabilities had increased from December 31, 1939 to December 31, 1940?

A. Correct.

Q. And after this transaction was completed there was nothing much left in Pacific Empire Holdings, Inc.? A. That is right.

Q. Did you call any meeting of the Executive Committee to pass upon this transaction?

(Testimony of Michael Maffei.)

A. No.

Q. Did you call any meeting of the board of directors to pass on this transaction? A. No.

Q. I notice a call of stockholders' meeting for February 14, [145] 1941. Did you send out to the stockholders any letter for the purpose of the calling of this meeting? A. No.

Q. Did you ever advise the stockholders at any time thereafter of the sale of this block or stock?

A. Not to my knowledge.

Q. Did you ever advise the board of directors at any time thereafter of the sale of this stock?

A. Not to my knowledge.

Q. When was the next meeting of the board of directors called subsequent to the executive committee meeting of October 17, 1940, which appears to be the last meeting?

A. I think it was the last.

Q. When was the next ensuing directors' meeting of this company held subsequent to October 17, 1940?

A. I don't think there was any meeting.

Q. Was the last meeting held October 20, 1942, for the purpose of consenting to the appointment of a receiver of this company? A. In 1942?

Q. Yes. This appears to be in the minute book, here. A. That was the last meeting.

Q. Was there any meeting in between October 17th and this meeting?

A. Not that I remember.

(Testimony of Michael Maffei.)

Q. Were the directors ever given an opportunity to affirm the transaction? A. No.

Q. Were the stockholders ever given the opportunity to disaffirm or approve of this transaction?

A. No.

Q. You said that the executive committee was never called or never met as a body or as a committee for the purpose of determining the advisability of this transaction? A. No.

Q. The proposal of either Mr. Arnold or Mr. Bercut was never submitted to the executive committee meeting in any wise?

A. Not to my knowledge. [146]

Q. Now, at this time Mr. Arnold was president of the Merchants Ice & Cold Storage Company, was he not? A. At that time, yes.

Q. He was drawing a salary from the Merchants Ice & Cold Storage Company?

A. That is right.

Q. How much was he drawing, do you recall?

A. I don't recall the exact amount, whether it was \$500 or \$600 a month.

Q. Do you know whether or not Mr. Arnold was indebted to the Merchants Ice & Cold Storage Company at that time? A. I never knew.

Q. I will now ask you whether or not, Mr. Maffei, you ever discussed the proposed sale of this stock with anybody, with any of the creditors.

A. No.

(Testimony of Michael Maffei.)

Q. Now, at this time Kohler & Chase was a creditor of the company? A. Yes.

Q. How much did the company owe them?

A. Ten or eleven thousand dollars.

Q. You had pledged stock of the Pacific Empire as security for the indebtedness: is that right?

A. That is right.

Q. Isn't it true that Pacific Empire Holdings Company had been a tenant of Kohler & Chase for many years in San Francisco?

A. That is right.

Q. You had had numerous transactions with Kohler & Chase? A. Yes.

Q. Ordinarily with Mr. Chase? A. Yes.

Q. 'Isn't it true that in the course of those business transactions Mr. Chase had advised you on repeated occasions that if the company came to a point where the company had to dispose of the controlling interest in the Merchants Ice & Cold Storage Company stock he wanted to be consulted, and he wanted to be permitted to bid?

A. Yes, he had a little interest in it, once we [147] talked about it.

Q. Didn't he say so to you?

A. He wanted to look into the details.

Q. Did you submit it to him before you sold the stock to Mr. Bercut?

A. Not to my knowledge.

Q. Isn't it true during the course of years you had numerous transactions with Joseph McInerney?

A. Yes.

(Testimony of Michael Maffei.)

Q. You had borrowed thousands of dollars from him? A. Yes.

Q. And on numerous occasions Mr. McInerney told you that he would be interested in acquiring this block of stock of Merchants Ice & Cold Storage Company?

A. Yes, but he never made an offer.

Q. Did you submit it to him? A. No.

Q. It is true, is it not, Mr. Scampini was a creditor of this company at this time?

A. Right.

Q. And Mr. Scampini once in a while would call you on the phone as to whether he would be paid something on the note? A. Yes.

Q. Of course, you would not tell him they could not pay? A. Yes.

Q. And Mr. Scampini was not paid?

A. That is right.

Q. Isn't it true that Mr. Scampini told you, Mr. Maffei, that if the company had to sell a block of stock in the Merchants Ice & Cold Storage Company he had some client who wished to take it?

A. That I don't remember.

Q. Did you submit it to Mr. Scampini?

A. I did not, I never did.

Q. Did you consult Mr. Scampini on this sale?

A. I never did.

Q. When did you first consult Mr. Scampini with regard to this matter?

A. I never consulted him at all.

(Testimony of Michael Maffei.)

Q. At this time Mr. Will Morse was a director and chairman of the board of the Merchants Ice & Cold Storage Company, was he [148] not?

A. That is right.

Q. He had been, up to a couple of years before, president of the Bank of America?

A. He was.

Q. He was there on the board representing the bondholders, wasn't he?

A. Correct.

Q. And isn't it true that the holding company had just a few months prior to this transaction borrowed some \$3000 from Mr. Morse?

A. That is right.

Q. And given him as security 1500 shares of the common stock of the Merchants Ice & Cold Storage Company?

A. Correct.

Q. In other words, he loaned you \$3000 on 1500 shares of common stock of the Merchants Ice & Cold Storage Company?

A. That is right.

Q. Did you see fit to consult with Mr. Morse with respect to the advisability of this transaction with Mr. Bercut?

A. I did not get that.

Q. Did you ever consult with Mr. Morse at any time prior to this transaction with Mr. Bercut?

A. No.

Q. Did you at any time prior to the closing of the transaction with Mr. Bercut consult with Mr. Morse?

A. I never did.

Q. At that time you were still indebted to Mr. Morse?

A. Correct.

(Testimony of Michael Maffei.)

Q. Did you advise your attorneys that this block of stock was going to be sold by Mr. Arnold to Mr. Bercut? A. No.

Q. Mr. Arnold and Mr. Bercut, I gather from what you said, conducted all of the negotiations in regard to this transaction?

A. I had something to do with it.

Q. What did you have to do with it?

A. He was going to consult me before doing so.

Q. You signed the letter, didn't you?

A. That is right. [149]

Q. At this time, Mr. Maffei, Mr. Ellis and Mr. Hubner were conducting the case in which a judgment had been obtained by the United States on November 20, 1940? A. Yes.

Q. On a contingent basis?

A. That is right.

Q. Did you advise Mr. Ellis and Mr. Hubner of this transaction with Mr. Bercut?

A. No, I did not.

Q. You don't know whether Mr. Arnold did?

A. No.

Q. But you never did? A. No.

Q. Did you make any effort, at all, to obtain a better price than Mr. Bercut submitted?

A. I never did.

Q. Who, if you know, placed the condition in the agreement or letter with respect to the option being not assignable, and in the event the company

(Testimony of Michael Maffei.)

would exercise it the voting rights would be in Mr. Bercut for seven years? A. Mr. Arnold.

Q. Mr. Arnold? A. Yes.

Q. As far as you know? A. Yes.

Q. Knowing the financial condition of Pacific Empire Holdings upon the consummation of this transaction, did you have any reasonable expectation of the company being able to exercise that option? A. No.

The Court: We will take a recess now until two o'clock.

(A recess was here taken until 2:00 o'clock p. m.)
[150]

Afternoon Session—April 21, 1943

2:00 o'clock P. M.

Mr. Scampini: With your Honor's permission and counsel's permission I would like to call out of order Mr. Chase, who is leaving town, and it is very important that I get his testimony into the record.

The Court: Very well.

GEORGE Q. CHASE,

called as a witness on behalf of plaintiffs; sworn.

Mr. Scampini: Q. You are, I assume, an officer of the firm known as Kohler & Chase?

A. Right.

Q. Which is a corporation? A. Yes.

Q. Kohler & Chase is the owner, and has been the owner, if I understand it correctly, of the building designated as 26 O'Farrell Street, San Francisco? A. Yes.

Q. How long have you owned that building?

A. We built the building back in 1910.

Q. Is it true or not that sometime in the year 1928, 1929, or 1930, or thereabouts, one of the tenants was the Associated Calitalo, Inc.?

A. Yes.

Q. Thereafter known as Pacific Empire Holdings, Inc.? A. Yes.

Q. Also tenants of the ground floor space were the City National Bank of San Francisco, was it not?

A. No, the tenants of the Calitalo or the Pacific Empire Holdings; they were a sub-tenant.

Q. City National Bank was a sub-tenant of Calitalo or the Pacific Empire Holdings, Inc.: Is that correct? A. Yes.

Q. In other words, as I understand your testimony, the Pacific Empire Holdings, Inc., or its predecessor, had a lease practically on the entire building for a period of time, did it not?

(Testimony of George Q. Chase.)

A. No. [151]

Q. Or for a large portion of it?

A. No, only the first three or four floors.

Q. Three or four floors, including the ground floor?

A. And the basement.

Q. How long did Pacific Empire Holdings continue to be a tenant of your building?

A. For a long period, I could not give you the date from memory on that, but I think from 1920 or prior to that, perhaps.

Q. And when did they cease being a tenant?

A. I believe sometime this year, or the latter part of last year.

Q. When the receiver was appointed, is that correct?

A. Yes, when the receiver was appointed.

Q. That is when the tenancy was terminated?

A. That is correct.

Q. Now, in the course of the relations between your firm and Pacific Empire Holdings, Inc., did you have any business transactions with them?

A. Yes.

Q. Running into very substantial sums, is that right?

A. Yes, amount due for rental.

Q. It is true, is it not, that sometime in the year 1933 or 1934 the original lease which comprised, as you say, the first three or four floors of the building, was cancelled by mutual consent upon settlement having been made agreeable to both parties?

Mr. Naus: I do not think he said three or four floors.

(Testimony of George Q. Chase.)

Mr. Scampini: What was it?

A. Three or four floors and the basement, I am not sure. You asked me as to the cancellation, I cannot give you that off-hand from memory, that was sometime ago. You represented them at the time, and you might refresh my memory.

Q. Sometime in the year 1934, and thereafter, a new lease was executed, was it not?

A. That is correct. [152]

Q. Which comprised a much smaller space?

A. That is correct.

Q. That lease continued right down to the time when it was again modified, was it not, sometime in 1937 or 1938?

A. Yes, it was again modified and they took less space.

Q. That continued until the receiver was appointed, when by mutual consent it was terminated?

A. That is correct.

Q. During the years 1938, 1939 and 1940, did the Pacific Empire Holdings, Inc. become indebted to your company for unpaid rent?

A. Yes, they were practically always indebted for back rent.

Q. Have you any record that would indicate how high that indebtedness reached at the end of 1940?

A. Toward the end of 1940, I have no records with me, but I can tell you it was between thirteen thousand and fifteen thousand dollars.

(Testimony of George Q. Chase.)

Q. Had they assigned you any collateral for the payment of this indebtedness?

A. Previous to that?

Q. Yes.

A. Yes, they assigned a note on the Merchants Ice & Cold Storage Company for \$10,000, and later that note was renewed for \$9500, and they had assigned previous to that other collateral at various times, and then later on they assigned us the total stock of the Pacific Empire Corporation.

Q. Sometime in the year 1942 did you find it necessary to sue the Pacific Empire Holdings, Inc. in San Francisco to enforce the collection of this rent?

A. I believe that an attorney did bring such a suit.

Q. Did you also bring an action against the Merchants Ice & Cold Storage Company to collect the promissory note that had been assigned to you, or endorsed over to you by Pacific Empire Holdings, Inc., by way of collateral for the payment of its obligation?

A. I believe that such a suit was filed.

Q. What did you ascertain to be the fact with respect to the [153] promissory note which had been assigned to you by Pacific Empire Holdings, Inc.?

Mr. Naus: Objected to as calling for hearsay, what he ascertained.

Mr. Scampini: The purpose of the testimony is to show that the promissory note which had been

(Testimony of George Q. Chase.)

assigned by Pacific Empire Holdings, Inc. through Mr. Arnold, as I will show by documentary evidence—the promissory note bears the date of October 10, 1940—purported to have been executed by Merchants Ice & Cold Storage Company, and signed by Mr. L. R. Arnold as president, and A. A. Heer, Secretary, when this note was assigned over to Kohler & Chase, and in the meantime suit having been filed, Mr. Chase discovered that the promissory note had been paid by Merchants Ice & Cold Storage Company to Pacific Empire Holdings, Inc., and that he never got the money.

Mr. Naus: Who never got the money?

Mr. Scampini: Mr. Chase.

Mr. Naus: As I understand it, Mr. Scampini, you are seeking to establish that Mr. Chase got a live note for \$9500 which was handed over by Mr. Arnold, and then later on, when he was trying to collect it, he found it was a dead note, and I will stipulate to that, that is the fact.

Mr. Scampini: Very well.

Q. When you discovered that Mr. Arnold had assigned to you a promissory note which, as counsel says, was a dead note instead of a live note, you made a demand for additional security, and that is when you got the Empire Pacific Corporation stock, is it?

A. That is correct.

Q. Thereafter, the Empire Pacific Holdings, Inc. did not pay the note and you foreclosed on the pledge whereby the Pacific [154] Empire Corporation stock had been assigned over to you?

(Testimony of George Q. Chase.)

A. That is the idea.

Q. After you foreclosed on the pledge you went and examined the books of the Pacific Empire Corporation, didn't you?

A. Yes, through our representative we did.

Q. What did you find in Pacific Empire Corporation, Mr. Chase?

Mr. Naus: Are you asking the witness to say what the books of the Pacific Empire Corporation show?

Mr. Scampini: Yes.

Mr. Naus: Objected to as calling for hearsay, secondary evidence.

Mr. Scampini: Q. I will ask you what did you find, by way of assets, if any, in Pacific Empire Corporation when you made inquiry, after having foreclosed on this Empire stock?

Mr. Naus: The same objection, that is not the best evidence. I am not seeking to conceal the facts, but there is a better way to prove it.

Mr. Scampini: Q. Were you ever able to find any assets with which to pay the obligation of Pacific Empire Holdings, Inc. to Kohler & Chase?

A. No, we were not.

Q. Did the Referee, after having come into possession of the books and records and assets of the company, make arrangements with you whereby your claim was settled and compromised?

A. That is correct, it was paid off.

Q. Now, Mr. Chase, in the course of your busi-

(Testimony of George Q. Chase.)

ness relations with the Pacific Empire Holdings, Inc., with whom did you deal, primarily and principally?

A. In the last four or five years Mr. Arnold dealt with us primarily.

Q. Did you have any occasion to discuss with Mr. Arnold their holdings in Merchants Ice & Cold Storage Company during this [155] period of time?

A. Yes, because that was their principal asset.

Q. When did you first discuss it with Mr. Arnold, do you recall?

A. Well, the first time I discussed it with Mr. Arnold must have been back in the early thirties, sometime, I should imagine, but I discussed it with him from time to time up to the time that he made the deal.

Q. When was the last occasion that you discussed the Merchants Ice & Cold Storage Company holdings with him, if you recall?

A. That was after the deal was made, in February or March, 1941.

Q. Prior to making the deal that you have referred to, I assume you mean the deal with Bercut?

A. Yes.

Q. Prior to the making of this deal, which appears to have taken place on January 8, 1941, when was it that you last discussed with Mr. Arnold the Merchants Ice & Cold Storage stock which was held by the holding company?

(Testimony of George Q. Chase.)

A. I should say somewhere in the middle of 1940.

Q. What were the circumstances under which the discussion came up between you and Mr. Arnold?

A. We were discussing the finances of the holding company and the method of borrowing, and the method of dealing with the bank, and I was offering some suggestion to him about——

Mr. Naus: One moment. He is not asking for anything said to him.

Mr. Scampini: Q. Did you ever make any statement or indicate any desire on your part to Mr. Arnold, if it should ever be available, to take an interest in Merchants Ice & Cold Storage Company?

Mr. Naus: One moment. There is no foundation laid that any of the defendants Bercut were present, or that they were in [156] any way connected with any such conversation called for, and therefore it would be hearsay, out of their presence, not binding on any of them.

Mr. Scampini: Mr. Arnold is a party defendant, Mr. Bercut is an officer and director of the company, owning the stock, and the charge is based upon a fraudulent transaction by fiduciary trustees, and whatever statements were made which would clarify the situation out of the presence of Mr. Bercut are admissible for the purpose of disclosing the situation, and it would be admissible as to the defendant Arnold.

(Testimony of George Q. Chase.)

Mr. Naus: You will note that my objection was that it is not admissible as to the defendants Bercut. I hold no brief for the defendant Arnold. If counsel wants to have it admitted as to Arnold I have nothing more to say, but it is clearly against Mr. Arnold.

The Court: I will allow it to go in subject to your motion to strike, over your objection.

Mr. Scampini: Will you read the question?

(Question read by the reporter.)

Mr. Naus: I do not care, your Honor, to repeatedly interrupt with objections, I have sought to avoid it as much as possible. May it be understood that I will make objections to similar questions to any other conversation, leaving it open to me to make a motion to strike without having repeated the objection?

The Court: That will be understood.

A. Yes.

Mr. Scampini: Q. When, approximately, was this expression on your part communicated to Mr. Arnold?

A. A number of times, over a period of four or five years.

Q. Was any such expression communicated to Mr. Arnold at this [157] last meeting, which was after the middle of 1940?

A. I mentioned it to him sometime after the middle of 1940.

Q. What did you say to him, if you recall?

(Testimony of George Q. Chase.)

A. I told him that if the Merchants Ice & Cold Storage Company needed the money or the holding company needed money we would be glad to make a loan of the money to the Merchants Ice & Cold Storage Company, or we would be glad to make a deal, without going into details, for an interest in the Merchants Ice & Cold Storage Company.

Q. Did you ask for any information or any data concerning the financial condition of those companies from Mr. Arnold at this time?

A. I said that the more we knew about the operations of the Merchants Ice & Cold Storage Company the more intelligently we could consider the subject.

Q. What happened as a result of this conversation?

A. Well, Mr. Arnold gave me a statement of the profit and loss covering a period of four years, including 1939.

Q. Of Merchants Ice & Cold Storage Company?

A. Of Merchants Ice & Cold Storage Company, yes.

Q. Did you have occasion to study those statements, Mr. Chase?

A. Yes, I looked them over carefully.

Q. And from a study of the statement which he gave you did you arrive in your mind at a figure which you felt would be the reasonable value for that outstanding stock of Merchants Ice & Cold Storage Company?

(Testimony of George Q. Chase.)

Mr. Naus: Objected to as calling in part for secondary evidence of a writing or writings; I have not the slightest idea from the questions and answers so far what kind of paper or papers Mr. Arnold may have turned over, whether complete or incomplete, and, secondly, upon the ground that even though a statement was turned over and this witness studied it, this [158] witness has not yet been qualified by way of any foundation as to competency by way of an expert or otherwise to give evidence of value.

The Court: Both objections, I think, are good.

Mr. Scampini: Q. Mr. Chase, have you got with you the information or data that Mr. Arnold supplied you with? A. I have.

Q. Will you please produce it?

A. This is marked "Schedule expense," but——

Mr. Naus: There is nothing before the witness. He has only been asked to produce the paper.

Mr. Scampini: We now ask that the document which the witness has just turned over to me be marked Plaintiff's Exhibit next in order for identification.

The Court: It may be marked.

(The document was marked "Plaintiff's Exhibit 23 for Identification.")

Mr. Scampini: Q. Mr. Chase, you have handed over to me what appears to be Merchants Ice & Cold Storage Company Schedule of Expense, what starts out by saying, "Merchants Ice and Cold Stor-

(Testimony of George Q. Chase.)

age Company, Total Operating Revenue for 1936'' in one column, 1937 in another column, 1938 in another column, and 1939 in another column. In the year 1936 operating revenue was indicated to have been \$353,321.28, in 1937 it was indicated as \$437,023.65.

Mr. Naus: If your Honor please, that document was merely marked for identification so far. It certainly is not going into evidence in a left hand way by being read by Mr. Scampini. The letter is not in evidence.

Mr. Scampini: I am trying to ask a question.

Q. I will ask you whether or not you examined and studied this [159] statement which purports to be not only a schedule of operating expenses, but a schedule of operating expenses, administration expense, and net profit before depreciation.

A. I did.

Q. Did you have any other information besides this information available to you which you studied for the purpose of determining whether or not you would be interested in taking a position in Merchants Ice & Cold Storage Company?

A. From time to time I had various information from various sources as to its business.

Q. Now, when was it that you say you first ascertained that the shares owned by the holding company of Merchants Ice & Cold Storage Company had been disposed of?

A. I think it was February or March, 1941.

(Testimony of George Q. Chase.)

Q. Will you state the circumstances under which you ascertained that fact?

Mr. Naus: Does that question embrace something somebody said to him, Mr. Scampini?

Mr. Scampini: I don't know what the circumstances are.

Mr. Naus: In view of the refusal to answer, I object to the question as being in form, calling for hearsay out of the presence of the defendant Bercut——

The Court: Lay the foundation for it.

Mr. Scampini: Q. How did you ascertain that fact? A. I talked to Mr. Arnold.

Q. Will you state when and where?

A. In my office about February or March, 1941.

Q. What was the occasion for this meeting in your office?

A. Mr. Arnold came in to discuss some financial arrangement with regard to arranging security for rent.

Q. What did you say to him and what did he say to you with regard [160] to Merchants Ice & Cold Storage Company?

Mr. Naus: Objected to as calling for hearsay as to the defendants Bercut.

The Court: I will allow it subject to the same motion.

A. Mr. Arnold said that he had made a deal disposing of the interest in the holding company in the

(Testimony of George Q. Chase.)

Merchants Ice & Cold Storage Company, except a small amount which they had retained.

Mr. Scampini: Q. Which they had retained?

A. Yes.

Q. Did he tell you how much they had retained?

A. He did.

Q. What did he say?

A. I don't recall the exact amount.

Q. Did he tell you to whom it had been disposed of? A. Yes, he did.

Q. What was the name mentioned?

A. Peter Bercut.

Q. Did he tell you the price for which it was disposed of? A. He did.

Q. What was the consideration that he told you?

A. I think he said it was \$35,000.

Q. What did you say to him?

A. I asked him why they made such a deal as that.

Q. What did he say to you?

A. He said they were in a jam and on the spot, and they had to do something quickly.

Q. What did you say to Mr. Arnold with regard to the consideration or price that was paid?

A. I don't know whether I said anything to him about that, except that I was astounded that they had made a deal of that character, and I reminded him that I had offered to take an interest in the Merchants Ice & Cold Storage Company, or to loan them money, and I could not see why they needed to make a deal of that character.

(Testimony of George Q. Chase.)

Q. Did he make any reply to that statement?

A. All he replied was that he remembered that I had done that, that I had made this [161] offer, and that apparently was not in his mind, they were on the spot, they were in a jam and had to make some kind of a deal quickly, and that was the only thing he could do.

Q. Did you ever have any discussion with Mr. Maffei with regard to the Merchants Ice & Cold Storage Company? A. I probably did.

Q. Do you recall when?

A. Very much earlier than that.

Q. You did not have any in 1940?

A. No.

Q. Did you ever have any with Mr. Maffei subsequent to the conversation that you have just testified to as having had with Mr. Arnold?

A. I did not.

Q. Now, Mr. Chase, do you know how many shares of common stock of Merchants Ice & Cold Storage Company the Pacific Empire Holdings, Inc. held at the time that you had your conversation with Mr. Arnold, which was after the middle of 1940, prior to the making of the deal?

A. I did know, because it was on the statement of the Empire Holdings that was submitted to me. I have not the figures in mind.

Q. Have you any idea as to the reasonable value on or about the end of 1940 of 65,863 shares of common stock out of a total of 107,180 shares outstand-

(Testimony of George Q. Chase.)

ing, and 12,495 shares of preferred out of a total of 41,615 shares outstanding?

Mr. Naus: I object to that as immaterial, whether this witness had any idea upon the subject or not, and upon the further ground that no foundation whatever has been laid to qualify him to testify to that.

Mr. Pardini: I join in that objection on behalf of the defendants Arnold and Maffei.

The Court: The objection will have to be sustained. The foundation has to be laid. [162]

Mr. Scampini: Q. In your discussion with Mr. Arnold did you ever indicate to Mr. Arnold to what extent or what your offer would be, or how much you would be prepared to pay for a block of stock in Merchants Ice & Cold Storage Company?

Mr. Naus: At what time?

Mr. Scampini: Q. At any time prior to December, 1940.

A. No definite offer of any specific amount was discussed at any time.

Q. You merely asked him to supply you with the data, in case he was thinking of selling it, you would be willing to discuss it with him?

A. I said after we had the information, authentic information about the stock and about the condition, that we would be in a position to make an offer and would be prepared to do business if an occasion arose in which it was deemed advisable for the stock to be sold.

(Testimony of George Q. Chase.)

Q. Were you ever given an opportunity to make any offer? A. No.

Mr. Scampini: That is all.

Mr. Naus: If your Honor please, there was certain evidence received subject to a motion to strike. Is it your desire to take that up now, or at the conclusion of the whole case?

The Court: At the conclusion of the whole case.

Mr. Naus: Then we can pass it now without prejudice to our rights?

The Court: Yes.

Mr. Naus: Mr. Scampini, would you be good enough to have that note marked for identification?

Mr. Scampini: Let us see if we can establish this.

Q. Mr. Chase, I will show you here a note in the principal sum of \$9500, dated October 10, 1940, which appears to have been [163] executed by Merchants Ice & Cold Storage Company, by L. R. Arnold, President, and A. A. Heer, Jr., Secretary, and endorsed over by Pacific Empire Holdings, Inc., by Mr. Maffei, President, and by L. R. Arnold, Secretary, and ask you if this is the note which was given to you in lieu of the original note of \$10,000, and which subsequently you found to be a dead note, as you have testified? A. I think it is.

Q. That note was given you? A. Yes.

Mr. Naus: Can we have the Clerk mark it?

Mr. Scampini: I will offer this in evidence, may it please the Court, as our next exhibit in order.

The Court: It may be admitted and marked.

(Testimony of George Q. Chase.)

(The document referred to was marked "Plaintiff's Exhibit 24.")

Mr. Scampini: Q. That note which has just gone into evidence as Plaintiff's Exhibit 24 was given to you as collateral security for the payment of the promissory note of the Pacific Empire Holdings, Inc., to Kohler & Chase, dated October 10, 1940, in the principal sum of \$13,308.93: Is that right? A. That is correct.

Q. That was the amount of the rent due to you at that time?

A. The amount of rent and interest, or whatever else they owed us at the time.

Q. When you accepted that note as collateral you did not know at the time that it was a dead note, did you? A. No, I did not.

Q. You reasonably assumed it to be a valid note?

A. I assumed it to be a perfectly valid note.

Mr. Scampini: I offer in evidence this promissory note of the Pacific Empire Holdings, Inc., dated October 10, 1940, and ask that it be marked as our exhibit next in order. [164]

The Court: It may be admitted and marked.

(The document referred to was marked "Plaintiff's Exhibit 25.")

Mr. Scampini: That is all.

Cross Examination

Mr. Brownstone: Q. Mr. Chase, you are an officer of Kohler & Chase? A. Yes.

(Testimony of George Q. Chase.)

Q. What officer? A. President.

Q. You are a large stockholder of that corporation? A. Yes.

Q. How many directors are there in the corporation? A. Five.

Q. You are the president. Are the directors related to you? A. Yes.

Q. So that Kohler & Chase Corporation in essence is your corporation?

A. Myself and my sister.

Q. Do Kohler & Chase own the building at 26 O'Farrell Street? A. Yes.

Q. Now, when was that building first occupied by the Associated Calitalo Holdings?

A. I don't remember the date, but it was quite a few years ago.

Q. Was the first tenant in the chain of these corporations the Brotherhood Investment Company?

A. I could not answer that. I think it was in connection with the Brotherhood corporation, they had a number of them.

Q. One of these corporations signed a lease with your firm covering the lower three or four floors of this building, is that correct? A. Yes.

Q. It executed a sub-lease to a bank, or you consented to that sub-lease, I assume?

A. I presume it was a sub-lease to the bank at the time, but I could not say positively of my own knowledge. [165]

(Testimony of George Q. Chase.)

Q. But it is a fact, is it not, that either the tenant or the sub-tenant spent a very substantial amount of money installing safe deposit vaults in those premises? A. They apparently did.

Q. Do you know how much money was spent in the installation of those safe deposit vaults?

A. I don't recall exactly, but it was considerable; I know that the doors cost fifteen thousand or sixteen thousand dollars.

Q. So that a very substantial amount of money was spent at one time in improving these premises?

A. That is right, by one of the Brotherhood corporations.

Q. Either the Brotherhood corporation or the successor corporation continued in the occupancy of these premises until 1933 or 1934, is that correct?

A. The dates are not in my mind, I have not had occasion to look them up.

Q. What is your best recollection?

A. The best of my recollection is that is about it.

Q. What were the rentals payable under the terms of the lease under which these premises were occupied? A. By which tenant?

Q. You testified, Mr. Chase, that there was a lease to Associated Calitalo Holdings in 1932 or 1933, we will say, and that they had as a sub-tenant a bank. What was the rental under the terms of the lease to your tenants?

A. Well, there were different tenants and differ-

(Testimony of George Q. Chase.)

ent times, I don't know the time and tenant you are referring to.

Q. In 1932, Mr. Chase, it is correct, is it not——

A. (interrupting) I could not give you those dates, I told you I did not have them in mind.

Q. So that you don't know who was occupying those premises in 1932?

A. I don't know exactly which corporation was paying rent. [166]

The Court: He said he could not fix the time.

Mr. Brownstone: Q. At any rate, you testified on direct examination that in 1932, 1933 or 1934 an agreement was entered into by and between yourself and Calitalo Holdings by which the lease then in force on the premises was canceled and a new lease was entered into.

A. I said at that time as near as my memory could state.

Q. Without confining yourself to any particular date on or about that time such a transaction was entered into?

A. Yes, there was a change in the lease.

Q. What consideration did you receive at that time for the making of that new agreement?

A. We received no consideration for the making of the new agreement. We got a consideration for cancelling the old one.

Q. What was the consideration for the cancelling of the old lease?

A. Once again, that is a complicated matter; I

(Testimony of George Q. Chase.)

would be very glad, if the Court wishes, to bring the agreement here. It took in many details, and it is quite complicated. I presume, if you wish me to tell you this, what counsel is driving at was that in that agreement their equity in the safe deposit vaults came as a part of the consideration for the cancellation of the lease.

The Court: Is that what you had in mind?

Mr. Brownstone: Q. That is one of the things. In other words the money consideration for the lease was the equity in those safe deposit vaults?

A. The safe deposit vaults as they stood at that time had apparently small value, but the doors and boxes, themselves, could be moved.

Mr. Brownstone: I move to strike that out.

The Court: It may go out. [167]

Mr. Brownstone: Q. Mr. Chase, after the cancellation of his original lease was any indebtedness due you from either Associated Calitalo Holdings or that same corporation under the name of Pacific Empire Holdings, Inc., immediately after the cancellation?

A. You mean before the cancellation?

Q. Yes. A. I believe not.

Q. Thereafter, was the rent paid by the Pacific Empire Holdings, Inc. from month to month to your firm?

A. If the Pacific Empire Holdings came into existence then and took over the lease then that would be correct.

(Testimony of George Q. Chase.)

Q. You have testified that on or about the end of 1940 there was an indebtedness of approximately \$13,000 to \$15,000 to your firm of the Pacific Empire Holdings; is that correct? A. Yes.

Q. During what period had that indebtedness arisen?

A. I don't know what period that covered, but it covered a considerable period, and they continued to fall behind in their rent in various amounts, they did not pay the full amount, and it had been running for some time.

Q. At or about the end of 1940 there was in the neighborhood of from thirteen thousand to fifteen thousand rent due?

A. Between those figures.

Q. At that time did you take a note of the company for that indebtedness?

A. At that time?

Q. Yes.

A. We took a note that is in evidence, here.

Q. Is that the first note?

A. Of \$13,000 and something. I don't know just the date of that, but we had this note or other notes.

Q. Mr. Chase, I will show you a document which has been marked Plaintiff's Exhibit 25, which purports to be a note of October 10, 1940, executed by Pacific Empire Holdings, Inc., in favor [168] of Kohler & Chase, in the sum of \$13,308.93. Is that the first note you took for the indebtedness?

A. I do not believe so, I think that was the renewal note.

(Testimony of George Q. Chase.)

Q. Now, were the notes previously executed secured?

A. Yes; that is, you say "the notes." I don't know whether there were notes, or a note, it depends how far you go back; there were a number of notes going back some years.

Q. Let us see if we can get at it this way: Was this note for which this note Exhibit 25 was given as a renewal secured? A. Yes.

Q. What was the security for that note?

A. The security that we had on that note was, as I recall, a ten thousand dollar note of the Merchants Ice & Cold Storage Company.

Q. Was there any other security?

A. I do not think there was.

Q. When this note was executed you testified that it was secured by a note of the Merchants Ice & Cold Storage Company dated October 10, 1940, for \$9500 in favor of Pacific Empire Holdings, Inc., and endorsed over to your corporation.

A. The renewal note of \$9500 instead of ten thousand.

Q. Was that note of October 10, 1942, of the Holding Company to you also secured by a pledge of any shares of stock in Pacific Empire Corporation?

A. I believe not at the time this note was drawn.

Q. All right. When was the first occasion on which shares of Pacific Empire Corporation were pledged as security for this note?

(Testimony of George Q. Chase.)

A. They were not pledged as security for the note of the Merchants Ice & Cold Storage Company, they were pledged as security for the note of the Pacific Empire Holdings.

Q. Let me reframe the question: When was the first occasion on which shares of Pacific Empire Corporation stock were pledged [169] to your corporation, Kohler & Chase, as security for the payment of the note dated October 10, 1940, in favor of your corporation, executed by Pacific Empire Holdings, Inc., and marked Exhibit 25?

A. It is possible I can give you that date if I may refresh my memory from some notes I have.

Q. You may.

A. In either April or May, 1941.

Q. With whom did you deal in order to secure a pledge of your note in 1941?

A. Mr. Arnold.

Q. Did you demand of Mr. Arnold that he furnish you additional security? A. Yes.

Q. At the time that you demanded additional security——

A. (interrupting) Additional security, we had no security when I demanded security, that is, what we considered as no security. I would like to explain that additional part of it, if you want it.

Q. In April or May, 1941, Mr. Chase, had you filed suit on this note, Plaintiff's Exhibit 25, against the Pacific Empire Holdings, Inc.?

A. That is the date that I have not here. I don't know what date the suit was filed by the attorney.

(Testimony of George Q. Chase.)

Q. Do you know whether or not at or about that time you had filed suit on the note of the Merchants Ice & Cold Storage Company which was pledged to you?

A. I testified, I think, that suit was brought by our attorney.

Q. You don't know when these suits were brought on behalf of your corporation?

A. I could not tell you the dates on which these suits were brought.

Q. In any event, you discovered this note of the Merchants Ice & Cold Storage Company, Plaintiff's Exhibit 24, was not an enforceable note, and as a result of that you demanded additional security?

A. ' Mr. Bercut gave me information that the note was [170] not a valid note, and that was the first information I had, and that was about the middle of April, about April 15, 1941. That is the first intimation I had the note was not a valid note.

Q. You say Mr. Arnold pledged the stock of the Pacific Empire Corporation with you, or your corporation.

A. Of the Pacific Empire Corporation, that is the controlling stock of the Pacific Empire Corporation.

Q. When did you foreclose that pledge?

A. There, again, I cannot give you the date, but it occurred after that sometime.

Q. At a later date you foreclosed that pledge?

A. Yes.

(Testimony of George Q. Chase.)

The Court: Foreclosed on what?

Mr. Brownstone: On Pacific Empire Corporation stock.

A. On controlling stock of the Pacific Empire Corporation.

Q. Did your corporation ever purchase any stock of the Merchants Ice & Cold Storage Company, preferred or common? A. No.

Q. Did you ever purchase any of the bonds?

A. No.

Q. Did you ever personally purchase any stock or bonds of the Merchants Ice & Cold Storage Company? A. No.

Q. Have you ever seen a balance sheet of the Merchants Ice & Cold Storage Company?

A. I think I have seen several balance sheets.

Q. You have produced a copy of a schedule of expenses which was furnished to you, according to your testimony, by Mr. Arnold, which has been marked Plaintiff's Exhibit 23 for Identification. At the time that he delivered this schedule to you——

A. That is not a schedule of expenses, although it is headed that. It is a statement of the expenses and profits.

Q. At the time that this statement was handed to you was any other document or documents given to you by Mr. Arnold relating to Merchants Ice & Cold Storage Company?

A. There were other [171] documents given to me, and I have them here, together with a letter to

(Testimony of George Q. Chase.)

Mr. Arnold; whether they came with this, or not, I don't know, but his letter to me is dated April 18, 1941.

Q. So that this letter you received from Mr. Bercut was subsequent to the purchase made by Mr. Bercut of these shares?

A. That is correct.

Q. So that the information furnished you prior to April, 1941, by Mr. Arnold consisted of this paper?

A. I could not tie this up with that date, because I had in 1940—not in 1941—I can say that this did not come in 1941 with this because now I realize that this is 1941—I know that was 1940.

Q. In other words, this was given to you in 1940?

A. As I recall, in the middle or last half of 1940.

Q. At the time Mr. Arnold gave you this in 1940 did he give you any other document?

A. Not that I recall.

Q. So that the information that you had with respect to Merchants Ice & Cold Storage Company furnished you by Mr. Arnold was this statement?

The Court: Identify it.

Mr. Brownstone: Plaintiff's Exhibit 23.

A. I would say no, I had considerable information, verbal and documentary, from Mr. Arnold previous to that at various times. In other words, I had received considerable information from Mr. Arnold.

(Testimony of George Q. Chase.)

Q. I will reframe my question: At the time Mr. Arnold furnished you with this statement, Plaintiff's Exhibit 23 for Identification, this is the only document he furnished you with?

A. So far as my recollection goes.

Mr. Brownstone: That is all. [172]

Redirect Examination

Mr. Scampini: Q. So that the record may be clear, I think I should ask Mr. Chase, in fairness to him, this question: When Mr. Wingate was appointed receiver of the Pacific Empire Holdings, Inc., Mr. Wingate, acting through his agent, Mr. Prince, as you have testified, compromised the claim which you had against the Holdings Company?

A. Yes.

Q. Although you had foreclosed on the pledge of the Pacific Empire Corporation, you returned all of the stock to the receiver, did you not?

A. Yes.

Q. By delivery to his agent, Mr. Prince?

A. That is right.

Mr. Scampini: That is all.

Mr. Brownstone: No further questions.

MICHAEL MAFFEI,

recalled:

Direct Examination

(resumed)

Mr. Scampini: Q. Mr. Maffei, I ask you to take a look at a document which appears to be dated March 31, 1940, and ask you if you have ever seen that letter before? Did you ever see that letter before?

A. That is the first time I have seen it.

Mr. Naus: I ask that it be marked for identification.

Mr. Scampini: It may be marked for identification.

(Letter of Peter Bercut to Pacific Empire Holdings dated March 31, 1940, was marked "Plaintiff's Exhibit 26 for Identification.")

Mr. Scampini: Q. When were you first advised of Mr. Bercut's resignation, if at all?

A. Just about a week or two after the deal was made.

Q. Who advised you of his resignation?

A. Mr. Arnold. [173]

Q. What did he say to you?

Mr. Naus: One moment, objected to as calling for hearsay, out of the presence of the defendants Bercut.

The Court: I will allow it to go in subject to the motion to strike, over the objection.

Mr. Scampini: Q. What did he say to you?

(Testimony of Michael Maffei.)

A. He said he had resigned from the corporation, and that he had the girl in the office date back the resignation two or three weeks.

Q. Date the resignation back? A. Yes.

Q. Did you see the original of this document, yourself? A. I did not see it.

Mr. Scampini: If your Honor please, I desire to call your Honor's attention to the pleadings wherein and whereby the answer of the defendant Bercut denies that he was a director or state substantially that he ceased being a director along about March 30, 1940, and thereafter interrogatories were propounded to the defendant, which interrogatories are on file, and in his answers to the interrogatories the defendant admits the execution or signing by him of a letter of resignation dated March 30, 1940, but admits having signed the said letter on or about January 8, 1941.

Mr. Naus: Is that the way you read it?

Mr. Scampini: Shall I read the questions and answers?

Mr. Naus: I think it would be better.

Mr. Scampini: In the answer filed by Peter Bercut, Ernest E. Bercut, Henri Bercut and Jean Bercut in this proceeding on December 17, 1942, the following allegation appears. This is page 5 of the answer, paragraph V:

“Answering the allegations of paragraph thereof”—— [174]

(Testimony of Michael Maffei.)

that is paragraph VII of the complaint——

“these answering defendants deny generally and specifically, each and every, all and singular, the said allegations. Further answering said allegations, these answering defendants allege that on or about December 31, 1940 the Board of Directors of Pacific Empire Holdings, Inc. consisted of six directors, namely, M. Maffei, A. A. Heer, Jr., L. R. Arnold, Luigi Giachini, Webb Richards, and T. M. Ryerson, and at said time the said corporation had an Executive Committee composed of two members, namely, M. Maffei and L. R. Arnold.”

Thereafter interrogatories were propounded to the defendant Peter Bercut, and Interrogatory 2, subdivision (a) was:

“State whether or not the document, a copy of which is attached to the deposition of L. R. Arnold as Plaintiff’s Exhibit No. 4, and which document purports to be your resignation as an officer and director of Pacific Empire Holdings, Inc., was signed by you on the date it purports to bear, namely, March 31, 1940?”

Will you stipulate, Mr. Brownstone, that the document attached to the deposition of Mr. Arnold is the document which has now been marked for identification?

Mr. Naus: I would rather have the deposition be produced so that the Court can know what we are talking about.

(Testimony of Michael Maffei.)

Mr. Scampini: The deposition of Mr. Arnold is here. Mr. Brownstone knows the situation.

Mr. Naus: Is that the exhibit which was marked at the deposition of Mr. Arnold?

Mr. Scampini: It was lost and thereafter found, and a copy substituted. This document was lost and later found.

Mr. Naus: Is that based on the evidence in the case? Who [175] lost it?

Mr. Scampini: The reporter. In the deposition there is a stipulation between Mr. Hubner and Mr. Brownstone that we might substitute a copy, is that right?

Mr. Brownstone: Yes.

Mr. Scampini: And this is the copy which was exhibited to Mr. Arnold.

Mr. Brownstone: I don't know whether it was in the deposition when it was filed. This document was apparently lost after the deposition was taken, and I don't know whether or not it was attached to the deposition when it was filed. As it is produced by Mr. Scampini, apparently it was not attached to the deposition.

Mr. Scampini: Mr. Brownstone, you will distinctly recall that I called you up and said, "The lost has been found, we found that document," and you said, "I am glad you found the original," but we substituted with the consent of you and Mr. Hubner a copy of this resignation in the deposition of Mr. Arnold.

(Testimony of Michael Maffei.)

Mr. Naus: If your Honor please, there is no dispute about its being the same document, but there is some suggestion about losing evidence, and I wanted to clear up about his losing and finding evidence, so that it could not appear that there was anything being thrown at us.

Mr. Brownstone: I am not trying to do anything of that character. It was lost in transcribing the deposition, and when counsel came back we found it had been mislaid in one of the many files.

Now, in answer to Interrogatory 1 the defendant states:

“Defendant admits that the original document, copy of which is attached as Plaintiff’s Exhibit 4 to the de- [176] position of L. R. Arnold, was signed by him and delivered by him to L. R. Arnold.”

That is the document which is dated March 31, 1940 and marked for identification for the present. I will offer it later when Mr. Arnold’s deposition is offered. In answer to Interrogatory 2(b):

“If your answer to the foregoing question is in the negative, please state on what date the said document was signed by you.”

And the answer is:

“To the best of this answering defendant’s knowledge the document was signed on or about January 8, 1941.”

The Court: That is the testimony of whom?

(Testimony of Michael Maffei.)

Mr. Scampini: That is the answer of Mr. Peter Bercut on his interrogatories.

The Court: And this witness testified what?

Mr. Scampini: This witness' testimony was that the resignation was a week or two after the sale of the stock to Bercut, at which time Arnold told him——

The Court: Did the witness say anything about dates?

Mr. Scampini: Did you say anything about the dates on your direct examination?

A. No. The only thing I said was that Mr. Bercut asked the secretary to, I think he wanted the date of resignation dated back a week or two.

Q. He wanted to date it back?

A. He wanted it dated back.

The Court: The testimony was it was dated back. I wanted to get it straightened out.

Mr. Scampini: Q. When was it that Mr. Arnold first told you of having received Mr. Bercut's resignation? A. About a week after the deal. [177]

Q. What else did he say to you with regard to the drafting of the resignation?

A. The only thing he said was that Mr. Bercut wanted the secretary to date it back two or three weeks.

Q. But as a matter of fact it was dated back to March 31, 1940?

A. I didn't see it, I don't know.

Q. You were not present when that was done?

A. No.

(Testimony of Michael Maffei.)

Q. Who was the secretary at the time?

A. Miss Keener.

Mr. Scampini: This morning I said, and Mr. Maffei said also, that he had never seen a duplicate original of the agreement dated January 8, 1941, between Pacific Empire Holdings, Inc. and Peter Bercut, and I have never seen a duplicate original, but I will say that in the files when we took over the books and records we did find what appears to be a second copy unexecuted by any party, and this second copy is the basis of our exhibit to the complaint, and was also used by us in taking the deposition of Mr. Arnold. I wish that fact to be disclosed.

Q. 'I will ask you, Mr. Maffei, whether in the files of the company you ever saw this copy of the agreement with Mr. Bercut.

A. This is the first time I have seen this one.

Mr. Naus: Will you mark what "this one" is?

Mr. Scampini: The agreement that I just showed you, being the agreement dated January 8, 1941, addressed to Mr. Peter Bercut, and which appears to be a typewritten copy of Plaintiff's Exhibit 22, you say this is the first time you have seen the copy?

A. Yes.

Mr. Naus: You mean the first time he has seen the carbon?

Mr. Scampini: Yes.

Mr. Naus: I understand he signed the original.

Mr. Scampini: That is right.

(Testimony of Michael Maffei.)

Q. You do admit having signed Plaintiff's Exhibit 22? [178] A. I signed it.

Mr. Scampini: I offer in evidence as Plaintiff's Exhibit next in order the office copy which I have used for the purpose of taking the deposition of Mr. Arnold; it is now marked plaintiff's exhibit for identification.

The Court: Dated when?

Mr. Scampini: Dated January 8, 1941, being a carbon copy of the agreement with Mr. Bercut.

The Court: It may be admitted and marked.

(The copy of the document referred to was marked "Plaintiff's Exhibit 27.")

Mr. Scampini: Q. Was the resignation of Mr. Bercut ever presented to the board of directors for its acceptance? A. It never was.

Q. Mr. Maffei, I will show you book V of the minutes of the directors' meeting of August 20, 1942, which appears to bear your signature, Mr. Maffei, at the bottom of that. Is that your signature? A. Yes, that is my signature.

Q. You state here——

Mr. Naus: You say he states there. I would like to have you hand that up to his Honor and let him see it. If your Honor please, you can see apparently that these are some minutes that have been prepared for a meeting that was to be held, with blanks to be filled in afterwards. It is true that they recite this, that and the other; it might or

(Testimony of Michael Maffei.)

might not have been presented at the meeting, the blanks have been filled in afterwards as to this, that and the other thing, but we have no showing that these things actually, physically occurred by way of conversation at a meeting.

Mr. Scampini: Q. Will you please read the minutes of that [179] meeting, Mr. Maffei, and state whether or not it refreshes your memory with regard to the resignation of Mr. Bercut?

A. This is the meeting we had.

Q. It is the first meeting you had after the transaction of Mr. Bercut of January 8, 1940, took place?

A. That is correct.

Q. That is when his resignation was accepted?

A. That is correct.

Mr. Scampini: You may take the witness.

The Court: We will take a recess.

(Recess.)

Cross Examination

Mr. Naus: Q. Mr. Maffei, I also hand you the Holding Company minutes of August 20, 1942, or purporting to be of that date.

A. Yes.

Q. Who wrote them up?

A. I don't know who wrote them up, I suppose Mr. Arnold wrote them up, or the bookkeeper.

Mr. Scampini: May it please the Court, I will gladly stipulate with counsel——

Mr. Naus: Just a minute, we will come to that. I think I know what the fact is.

Q. You started to answer you supposed. Now,

(Testimony of Michael Maffei.)

in order that we may understand each other, let us not do any supposing. Who wrote them up?

A. I don't know.

Q. When did you first see them?

A. When I seen them?

Q. When was that?

A. I could not exactly say when, but it was after the meeting was held.

Q. You have no recollection? A. No.

Q. I notice there are some other signatures at the end of them. Were you present when anybody else signed them?

A. There was not when I signed. [180]

Q. Were you present when anybody else signed them?

A. When I signed them I was just by myself.

Q. That is not my question. I did not ask you whether anybody else was present when you signed. I am asking whether you were present when anybody else signed. A. I don't remember.

Q. Now, can you tell me whether or not that last signature on there—what is that name?

A. Mr. Giachini.

Q. Can you tell me whether or not that signature has been put on there since these minutes were used in Mr. Arnold's deposition in September of 1942? Could you tell me that?

A. I couldn't tell you.

Q. To make it clear, you recall, do you not, that Mr. Arnold's deposition was taken last September?

A. Right.

(Testimony of Michael Maffei.)

Q. In September, 1942?

A. That is right.

Q. You are not prepared to tell me right now whether Mr. Giachini's signature was on these minutes when Mr. Arnold's deposition was taken, is that correct?

A. I couldn't tell you yes or no.

Q. Now, will you look through the minutes. You will notice places where there are two different—apparently two different typewritings, one heavier than the other, and that the heavier typewriting is filled in by way of filling in blanks. You see that, don't you?

A. Well, to me it looks all alike.

Q. It looks all alike to you? A. Yes.

Q. 'Can you tell me whether or not, and without regard to when the minutes were signed, whether the minutes were written before the purported meeting which they attempt to record?

A. I couldn't answer that.

Q. You don't know one way or the other?

A. I don't know.

Q. Please let me finish: You don't know one way or the other whether the minutes were written before or after?

A. Right. [181]

Q. You don't know one way or the other, whether the minutes were written before or after the purported meeting, do you?

A. No.

Q. You don't know whether or not the minutes were written before the purported meeting or thereafter at the purported meeting things took place as

(Testimony of Michael Maffei.)

recorded in the minutes, do you? A. I do not.

Q. Now, can you tell me whether or not in the purported meeting of this holding company, or the Empire Corporation, or the Merchants Ice & Cold Storage Company, or the Laundry Company, and the like, whether on any other occasion minutes of a purported meeting were written before the purported meeting took place?

A. Always after—the minutes were always written after the meeting.

Q. You are quite sure of that?

A. I am pretty sure.

Q. Did you ever, personally, write the minutes?

A. Not a one.

Q. Did you ever see them written? A. No.

Q. You were never, personally, the author of any of these, were you? A. No.

Q. You have, personally, never seen the minutes written?

A. Well, I have seen them dictated to the secretary and she would write them up.

Q. Were you dictating them?

A. Mr. Arnold dictated the minutes.

Q. Always? A. Yes.

Q. Well, did Mr. Arnold dictate, so far as you know, these minutes of August 20, 1942?

A. I couldn't tell you.

Q. Going back to the resignation of Mr. Scampini, the resignation in April in the year 1936, resigning as a director of the Pacific Empire Corpo-

(Testimony of Michael Maffei.)

ration, you recall that letter of resig- [182] nation, don't you? A. I do.

Q. And without stopping to look at it, because we have already read it, you recall that in there he stated one of the reasons he was resigning was that no meeting had ever taken place since the organization of the company?

A. That was of one corporation.

Q. I did not ask you to take offense at the corporation, I say you remember, don't you, that he gave that as a reason in 1936 for resigning from that corporation?

A. Well, that corporation, yes.

Q. Well, you remember, don't you?

A. Yes.

Q. Now, that was the Pacific Empire Corporation, wasn't it? A. Correct.

Q. And that letter of resignation by Mr. Scampini was—what was it, three or four years after the organization of the company, or how long?

A. Oh, I don't know, I guess a couple of years, maybe, or three.

Q. When was the Pacific Empire Corporation organized?

A. It was organized I think, in—I don't know whether it was 1932 or 1933.

Q. You recall, don't you, that this resignation letter of Mr. Scampini was around three or four years after the organization of that company?

A. In that neighborhood.

Q. In that neighborhood? A. Yes.

(Testimony of Michael Maffei.)

Q. Was or was not the statement that Mr. Scampini made in his letter of resignation as director true?

A. Well, as to certain portions it was true.

Mr. Naus: I ask that that go out as not responsive. I asked him whether the statement is true as to a particular corporation.

The Court: He qualified it. I will allow the answer to [183] stand.

Mr. Naus: Q. From the time Pacific Empire Corporation was organized in 1933 until the time of Mr. Scampini's resignation letter of 1936 had or had not any meetings of the stockholders or directors of Pacific Empire Corporation actually occurred in fact?

Mr. Scampini: May it please the Court, I submit the record speaks for itself. The minute book of the Pacific Empire Corporation is marked for identification, if counsel wants to read from it.

The Court: He may answer the question.

Mr. Naus: May we have the question read?

(Question read by the reporter.)

A. There was no stockholders meeting, no.

Q. Well, my question was more than that, not merely stockholders, stockholders or directors, had there been any directors meetings in fact after the organization meeting in 1933 and prior to Mr. Scampini's resignation letter in 1936?

A. There were some meetings, but I don't know how many.

(Testimony of Michael Maffei.)

Q. Well, there were some meetings of the directors——

A. I think the book will show.

Q. I am not asking what the book shows. We have here a statement from your attorney in resigning, and putting it partly on the ground that you had not held any meetings. I am trying to find out whether that was or was not true.

A. Well, while Mr. Scampini was a director I don't think we had any meeting.

Q. He had been a director from the time of organization in 1933 until the date of his resignation letter sometime in 1936?

A. Doesn't the minute book show he was a director? [184]

Q. I am asking you.

A. I don't remember if he was a director from the start of the organization, or not.

Q. Well, will you please look at the book?

The Court: Ask him if he knows what the fact is.

Mr. Naus: Q. Do you know what the fact is? Where is the book? I have never personally examined the book so far because it was produced by Mr. Scampini.

The Court: Do you know whether Mr. Scampini was a director?

Mr. Scampini: Yes, Mr. Scampini was a director from the inception. I will stipulate to that.

Mr. Naus: Mr. Scampini is prepared to state from the time of the organization of the company in 1933 until his letter of resignation he had been

(Testimony of Michael Maffei.)

a director, so you will accept that statement, won't you? A. Yes.

Q. I understand you to say that from the organization until he resigned there had never been any directors meeting of the Pacific Empire Corporation: Is that correct? A. That is correct.

Q. Now, I show you page 72 of the Pacific Empire Corporation: Does that contain or carry your signature as chairman of the meeting of the board of directors? A. Right.

Q. And on page 71, the page before, the waiver of notice of meeting, is that also your signature?

A. Correct.

Q. Did you on page 73 sign the waiver of notice of meeting, and did you on page 72 sign minutes of the purported meeting of the board of directors of Pacific Empire Corporation as of January 8, 1935, a meeting that never occurred?

Mr. Scampini: I object to the concluding statement of Mr. Naus, "a meeting that never occurred."

The Court: You are assuming a fact not in evidence.

Mr. Naus: He has already stated that from the organization [185] in 1933 until Scampini's resignation in 1936 there had never been a meeting, and this is a date in between.

The Court: There was no meeting between those dates?

Mr. Naus: That is his testimony.

Mr. Scampini: The minutes are the best evidence.

(Testimony of Michael Maffei.)

The Court: Proceed.

Mr. Naus: Q. Please keep that open at 71 and 72, I am going to ask a question or two about it and we will pass to something else. Now, I point out to you, call your attention to page 72, that that purports to be the minutes of a meeting of the directors on January 8, 1935. I point out to you that that was after the organization meeting and more than a year before Mr. Scampini's resignation, and having that in mind, is it not a fact that that meeting never in fact took place?

A. I couldn't answer that, if there was a meeting or not.

Q. Well, then, I turn to another page here, page 74, is your signature on there?

A. It is all on there.

Q. Is your signature on there? A. Yes.

Q. Waiver of the meeting of the board of directors of Pacific Empire Corporation to be held May 15, 1935, do you see that? A. Yes.

Q. The next page, 75, is your signature on there as chairman of a purported meeting?

A. Right.

Q. A meeting of the board of directors purporting to take place May 15, 1935? A. Yes.

Q. Did that meeting in fact take place?

A. We had so many meetings that I couldn't remember what I signed.

Q. I can't say either, and that is why I am asking some questions about that and I would like to

(Testimony of Michael Maffei.)

have an answer. Did that meeting take place on May 15? A. I don't remember. [186]

Q. At page 75 of the minute book of the Pacific Empire Corporation? A. I don't know.

Q. You don't know? A. Yes.

The Court: Q. You have already testified that there was no meeting occurred up to the time Mr. Scampini resigned, or did I misunderstand the testimony?

A. We had so many meetings there that I don't remember if we had any meeting at all.

Q. You have already testified that there was no meeting.

Mr. Naus: Up until the Scampini resignation.

The Court: That is what you testified, that there was no meeting.

Mr. Naus: Q. Your final answer is, as you look at the particular minutes on page 75, the meeting of May 15, 1935, you are not prepared to say at this moment, notwithstanding your signature there as chairman, whether the meeting ever took place?

A. That is right. I don't know.

Q. All right, on page 76, is your signature on there? A. Right.

Q. That is on a purported waiver of a directors meeting as of May 17, 1935, is that correct?

A. Yes.

Q. Turn to page 77, running over to page 78, that purports to be minutes of a purported meeting of the board of directors of May 17, 1935; that is correct, isn't it? A. Right.

(Testimony of Michael Maffei.)

Q. Is that your signature on page 78?

A. Yes.

Q. As approving them? A. Yes.

Q. Did that meeting in fact take place?

A. I don't recollect, I signed it.

Q. You have already told me that. Pages 81 and 82 and so on are purported exhibits.

A. Yes.

Q. We turn next to page 83, that is your signature on there, is it? A. Right. [187]

Q. Of a purported waiver of a purported meeting for Saturday, May 18, 1935. A. Correct.

Q. Followed by pages 84, 85, 86, 87, a running account of a purported meeting of the board of directors of May 18, 1935. Now, your signature is on that, is it? A. Right.

Q. Why is it? A. I don't know.

Q. Do you know the signature there?

A. Yes.

Q. Whose is it? A. Mr. Heer's.

Q. He was just the bookkeeper there?

A. Secretary.

Q. He was bookkeeper?

A. Bookkeeper and secretary.

Q. Bookkeeper of all of the corporations?

A. Yes.

Q. Did that purported meeting of May 18, 1935, take place, in fact?

A. I couldn't answer that one.

Q. Now, the next are exhibits. Now, for ex-

(Testimony of Michael Maffei.)

ample, beginning at page 88 and running to 89, 90 and 91, there is a document headed "Agreement," that is referred to in these purported minutes of May 18, 1935. You can see that, can't you?

A. Yes.

Q. You are not prepared to say, are you, that this purported agreement, pages 88, 89, 90 and 91, purported to be incorporated in purported minutes of the meeting, ever was approved by the Board of Directors of Pacific Empire Corporation held in fact: is that correct?

A. Yes.

Q. And the same is true as to this mass of documents following immediately after that and running to and including page 98, and also the other documents.

A. Yes.

Q. That relate to the same purported meeting, don't they?

A. Yes.

Q. You cannot say whether they were approved at a meeting of the board of directors held, in fact, can you?

A. Right.

Q. Now, I turn next to an unnumbered page, but apparently follow- [188] ing in chronological sequence, and purporting to be minutes of a quarterly meeting of the board of directors on the 27th of March, 1936, consisting of three pages, the third page having signatures. Is that your signature on there as chairman?

A. That is right.

Q. Did that purported meeting of March 27, 1936, ever take place, in fact?

A. You mean of the directors?

(Testimony of Michael Maffei.)

Q. I mean just what I asked. Turn your attention to specific pages in the minute book of the Pacific Empire Corporation, and one purported meeting on a particular date, and I will ask you whether that meeting took place, in fact. Did it or not?

A. I have no recollection.

Q. You cannot say one way or the other, can you?

A. No, I won't say yes or I won't say no.

Q. In any event, the mere fact that your signature is on there does not establish that it did take place, does it, do you get my question?

A. Well, the answer is the same, I don't know.

Q. Well, my question is this, I don't know what "yes" or "no" means in your mind; I will reframe the question so there can be no misunderstanding about it. The mere *find* that you find your signature on a purported meeting of the board of directors does not establish to your mind or memory that a meeting actually occurred, does it? A. No.

Q. As a matter of fact, when you see your signature, the signature "Maffei" on the minutes of a corporate meeting or purported meeting, for all you know that may or may not have ever taken place in fact, isn't that right? A. Correct.

Q. Now turn next to the unnumbered page or two pages, rather, purporting to be minutes of a purported regular quarterly meeting of the board of directors of Pacific Empire Corporation of June [189] 26, 1936. A. Yes.

Q. Your signature is not on there, is it?

(Testimony of Michael Maffei.)

A. No.

Q. There is Arnold's and Heer's signatures on there?
A. That is right.

Q. Did that meeting take place, in fact?

A. I don't know.

Q. What office did you hold in this corporation?

A. President.

Q. And chairman of the board of directors, as well?
A. Yes.

Q. Now, these purported minutes of the purported meeting of June 26, 1936, refer in their body to Exhibit "A" which immediately follows the two pages of minutes, and is headed "Assignment by way of collateral," and consists of two pages. Was that purported assignment ever approved or adopted by the board of directors of the Pacific Empire Corporation at a meeting held in fact?

A. Don't the minutes show?

Q. Please don't ask me any question about the minutes, you were present and I was not, and I am trying to find out from you. Can you answer that question?

A. I can't answer that question.

The Court: I think there is a lot of time being wasted. Why can't you answer the question? You have already testified there was no meeting held between the period of time you have gone over now.

A. We might have had a meeting or we might not.

(Testimony of Michael Maffei.)

Q. You have already testified there were no meetings occurred.

Mr. Naus: I am trying to call your attention to specific meetings.

The Court: It is mockery, outside of the court, and I do not approve of it, and I do not propose to waste any time on it.

Mr. Naus: Then I will turn to the last meeting, because I understand this is the one at which Mr. Scampini's resignation was presented. Now, at that purported meeting, quarterly meeting of the board of directors of September 25, 1936, at which [190] were present Maffei, Heer, Arnold and Ber-cut, and absent Scampini, and purporting in the minutes to act upon the resignation of Mr. Scampini, was even that meeting of September 25, 1936, held, in fact? Did you actually accept Mr. Scampini's resignation at a meeting that was actually held? A. No.

Q. In other words, the minutes purporting to accept his resignation are minutes of a meeting that never occurred, is that right?

A. That is right.

Q. Now, there is a copy of Mr. Scampini's letter attached to these purported minutes and it recites there to you folks, "I have been constrained to make this decision because of the fundamental differences of opinion prevailing between me and the management concerning the policies and conduct of the company's business." I take it for granted,

(Testimony of Michael Maffei.)

necessarily, that Mr. Scampini, a reputable lawyer, would not have written a letter to a client making such a statement unless there was some disagreement between him and the client, and if there was a serious disagreement I would assume that the client would remember it. What were the differences which led to the resignation?

A. It was on account of the meetings of the corporation.

Q. That is true generally, but you must have had some talk between you, attorneys do not quit clients quick like that after a few years of service. What did you say and what did he say?

Q. We did not have any talk about it, at all.

Q. Did he say, "Well, now, unless you start holding meetings I will resign, but if you start them and follow my advice I won't resign." Did he say anything like that? A. No.

Q. Did it come out of a clear sky?

A. Yes.

Q. You mean you got that letter of resignation out of a clear sky, without any quarrel about it?

A. He complained about the [191] meetings and that is all the reason.

Q. What, specifically, did he complain about meetings?

The Court: The testimony is that he resigned because——

Mr. Naus: They had no meetings.

The Court: They had no meetings.

(Testimony of Michael Maffei.)

Mr. Naus: Q. Well, from the time he resigned, onward from there, in the future, did you actually hold meetings? A. After he resigned?

Q. Yes. A. We had no meeting.

Q. Well, do you mean to say that this minute book of the Pacific Empire Corporation, this Volume 1, from beginning to end, throughout, recorded meetings that never occurred?

A. We would hold meetings at the office.

Q. Who?

A. Just the four of us, of the corporation.

Q. There were five on the board?

A. Five on the board.

Q. I want to get this clear in my mind: You mean that up to the time that Mr. Scampini resigned you never held meetings, but after he resigned you always held a meeting that was recorded there?

A. As I said before, I don't know how many meetings we held, I don't remember.

The Court: Q. Have you any distinct recollection of any meeting being held? Let us find out about that.

Mr. Naus: With your Honor's indulgence, I would like to do this. I now invite you to look through that minute book for all minutes of purported meetings of directors from the time of Mr. Scampini's resignation onward, and point to a single meeting that you say actually took place.

A. I can't tell you which one.

(Testimony of Michael Maffei.)

Q. I didn't ask you whether you could tell me which one. I asked you if you could point to any one that took place. I am not assuming that any took place, that is the reason my question is [192] the way I put it.

A. I could not say which one.

Q. You are using the word "which". My question is a little different.

A. I understand.

Q. Then answer it, please, kindly, the way I put it, is there any single meeting recorded in the book that in fact took place?

A. I could not tell which.

Q. Or whether any?

A. Or whether any.

Q. Now, down there at 26 O'Farrell street, you had your offices, as I understand it.

A. Correct.

Q. And all of these corporations occupied these offices for the same purpose?

A. Correct.

Q. There was Pacific Empire Holdings?

A. Right.

Q. And formerly the Calitalo was there?

Q. Yes.

Q. And the Pacific Empire Corporation?

A. Correct.

Q. And the Merchants Ice & Cold Storage Company?

A. Yes.

Q. And the Laundry Company, what was its name?

A. Laundry Service.

Q. There were some others from time to time?

A. Yes.

(Testimony of Michael Maffei.)

Q. All being run by the same two executives, Arnold and Maffei? A. Yes.

Q. With the same bookkeeper, Heer?

A. Yes.

Q. Now, in handling the affairs of these various corporations through that staff, did you handle the affairs of any one of these corporations in any different routine manner than you handled the affairs of any other?

A. Mr. Arnold handled pretty nearly all of the financial affairs of the corporations, of all of the corporations.

Q. My question is a little different. I am speaking now as to the manner of handling, not how you divided up the work, but the manner of handling. When it came to the writing up of the minutes, and keeping books, and the like, didn't you handle the [193] affairs of the corporation in the same manner?

A. No.

Q. You draw a distinction or difference between the corporations, do you?

A. Well, one corporation, the Merchants Ice & Cold Storage Company, we had meetings in that every month.

Q. Well, now, that is one thing. You actually held those meetings, did you? A. Yes.

Q. Where?

A. We held them on O'Farrell street, and at the Merchants Ice & Cold Storage Company both.

Q. Can you tell me any other difference in manner of handling affairs of those multitudinous cor-

(Testimony of Michael Maffei.)

porations—let us take the Pacific Empire Holdings.

A. We held our meetings there once or twice a year, or three times a year.

Q. What meetings?

A. Stockholders and directors meetings.

Q. They actually took place, in fact?

A. Yes.

Q. What was there about Pacific Empire Holdings Corporation that distinguished it from Pacific Empire Corporation with respect to whether meetings were actually held or not? Why did you distinguish between one of those corporations and the other one?

A. I don't know, there was some lack there some place.

Q. You just suppose there was some lack—
l-a-c-k? A. Some lack there.

Q. What lack was there?

A. Well, we didn't hold meetings as with the other corporation.

Q. I know that is what you told us, but I am trying to find out not only for the benefit of myself, but for the benefit of the court, why you handled the affairs of one corporation any differently than you handled the affairs of another corporation. You have told us that you handled them differently, but you had not come to the point of telling us why.

A. There was no reason [194] for it.

Q. There was no reason. As you sit there right now you know, don't you——

(Testimony of Michael Maffei.)

A. (Interrupting) Yes.

Q. That there is absolutely no reason under the sun, whatever, why you should have handled the affairs of the Pacific Holdings any different from your manner of handling the affairs of the Pacific Empire Corporation? A. That is right.

Q. Now, tell me, Mr. Maffei, why did you and Mr. Arnold sell this block of Merchants Ice & Cold Storage Company stock to Mr. Bercut?

A. On account of financial conditions.

Q. Well, can you keep in mind that this whole lawsuit is about that sale? A. I understand.

Q. And that you are one of the defendants, here, and you have an attorney sitting over at the table where I am? A. That is all right.

Q. All right, can you tell his Honor any more about why you sold that stock to Bercut than you have just said?

A. That is all we sold it for, on account of financial conditions, and finding ourselves pressed for finances; there was nothing else to do.

Q. You had been in there at 26 O'Farrell street, you and Mr. Arnold—— A. That is right.

Q. How long, for how many years?

A. About twelve years.

Q. You and Arnold, both?

A. Arnold came in after.

Q. I am asking how long you and Arnold were in there together.

A. Oh, I think about ten or eleven years.

(Testimony of Michael Maffei.)

Q. About ten or eleven years before this sale to Bercut? A. Right.

Q. Now, there was at one time what might be called a Vincent-Stratton management of these corporations? A. Right.

Q. That began when and ended when?

A. That began in 1929; they [195] were there before I was.

Q. They were there before you were?

A. I went in about the first part of 1929.

Q. Who put you in there?

A. Mr. Stratton and Mr. Vincent.

Q. Mr. Vincent was a stock promoter and they formed a partnership between Vincent and Stratton? A. Yes.

Q. This stock firm of Vincent-Stratton was the one who put you into 26 O'Farrell street in the first instance? A. Yes.

Q. Then when you bought the big block of Merchants Ice & Cold Storage Company stock, the Pacific Holdings, you bought it from the Vincent-Stratton crowd, did you not? A. Right.

Q. Which by that time had been joined by a lawyer, by Joseph McInerney? A. Yes.

Q. It was a three-way deal between McInerney, Stratton and Vincent?

A. It was McInerney, Stratton and Vincent and Sherman, four.

Q. Did Sherman have anything to do with the deal, or wasn't the cut three ways between Vincent, Stratton and McInerney?

(Testimony of Michael Maffei.)

A. There was an option, the three of them got together and sold the block of stock to the holding company for a certain amount.

Q. Three of them? A. Four.

Q. Three or four?

A. Vincent, Sherman, Stratton and McInerney.

Q. And at that time the management changed away from Vincent and Stratton, didn't it?

A. Correct.

Q. Who did it change to?

A. It came to myself and Mr. Arnold.

Q. In other words, from the time Vincent, Stratton and McInerney went out of the management you and Mr. Arnold have been in the saddle there ever since until the receiver came in, running these corporations to suit yourselves, haven't you?

A. Well, we tried to run them to the best of our ability. [196]

Q. I know to the best of your ability, but you and Arnold decided just what was to be done and did it, isn't that correct? A. Yes.

Q. That was during all of the time after Vincent and Stratton went out and left you in there?

A. Yes.

Q. That ran over a period, let us say, of ten years before the sale to Bercut?

A. About nine or ten years.

Q. And in that ten-years time is it not true that the aggregate of the annual deficits of Merchants Ice & Cold Storage Company, after giving effect to depreciation, exceeded a half million dollars?

(Testimony of Michael Maffei.)

A. In that period of time?

Q. That is the period I am taking.

A. After depreciation?

Q. After depreciation. Do you understand my question, or shall I have the reporter read it?

A. I understand the question. What is the exact amount?

Q. Would it help you if I gave you the exact amount?

A. I know after depreciation there was a loss.

Q. So do I, but I want his Honor to learn exactly what it was. You have been testifying on your direct examination to the valuation, and so forth and so on. Let us find out what the fact is.

A. Yes.

Q. So I will put the direct question to you, a man who was running things, or was responsible, with Mr. Arnold, in running things, and who had custody of the records, and presumably approved the balance sheet, I will ask you if it is not a fact that under the management of yourself and Arnold, in the period of ten years ending December 31, 1940, and preceding the sale to Peter Bercut, whether the aggregate of the annual deficit of the Merchants Ice & Cold Storage Company for that period was \$523,-501.35?

A. I don't think we managed the thing ten years, [197] the Merchants Ice & Cold Storage Company.

Q. I will reframe the question. How long did you state that you had control?

A. Well, I couldn't give you the exact figures.

(Testimony of Michael Maffei.)

Q. What was the first year you had control?

A. I think the holding company did not get control until after the management commenced of the holding company.

The Court: We will adjourn now. There is a jury coming in here tomorrow and the case will go over to May 4th.

Mr. Scampini: Might I say that Mr. Wingate and Mr. Culbertson are here from Wilmington and they will have to go back, and I would like to know whether or not counsel is willing to stipulate that under the laws of Delaware, with respect to the rights vested in the receiver which I have pleaded in my complaint, and if not I would like to put Mr. Wingate on the stand.

Mr. Naus: I would rather put it this way, I would rather not stipulate to it, but I am willing to withdraw our denial in our answer of the allegation in the complaint.

Mr. Scampini: Mr. Culbertson says he is not willing to accept that. He says that the stipulation he wants is that under the laws of Delaware all rights are vested in the receiver.

The Court: There is no question but that the receiver is vested with title to all the property and assets. You can enter into a stipulation with counsel as to anything further.

Mr. Naus: I think so.

(Thereupon an adjournment was taken until Tuesday, May 4, 1943, at 10:00 o'clock a. m.)

(Testimony of Michael Maffei.)

Tuesday, May 4, 1943—10:00 A. M.

MICHAEL MAFFEI

recalled;

Cross Examination

(resumed)

Mr. Naus: Mr. Maffei, toward the end of the other day in court, you stated the reason you sold this Merchants Ice & Cold Storage stock to Mr. Bercut was on account of financial conditions, the company was pressed for finances, and there was nothing else for you to do. You recall that answer, do you not? A. That is right.

Q. Now, Mr. Maffei, as a matter of fact, in the handling of these various corporations,—the Pacific Empire Holdings, Inc., Pacific Empire Corporation, Merchants Ice & Cold Storage Company, and the Laundry Company, and so on,—you and Mr. Arnold took the cash that any of these corporations had on hand at any time and used it as you pleased for the use of any of the other corporations, didn't you?

A. That is right.

Q. In so far as yourself and Mr. Arnold were concerned, these corporations had four different pockets, and you took it out of one pocket of the four and put it into any one pocket that you wanted?

A. We used one corporation as the holding company.

Q. Now, as a matter of fact at the time you sold this to Mr. Bercut, with respect to the financial difficulties you were speaking about, all four corpora-

(Testimony of Michael Maffei.)

tions had substantially run out of cash, hadn't they, and credit for all practical purposes?

A. They had.

Q. As a matter of fact, the Merchants Ice & Cold Storage Company did not have enough cash on hand to meet its payroll? A. That is right. [201]

Q. You had not only run out of credit, but you had reached the extreme end of your credit, hadn't you? A. Correct.

Q. You tried to borrow more money and could not, isn't that the fact?

A. That is right.

Q. When I say "tried to borrow money," you were not able to borrow any on the credit of any of the corporations, is that right?

A. That is right.

Q. As a matter of fact, you not only did not have enough cash to meet the payroll of the Merchants Ice & Cold Storage Company, isn't that right? A. That is a fact.

Q. Down at the Merchants Ice & Cold Storage Company you were quite a consumer customer of the P. G. & E., were you not, for electricity and power?

A. Yes.

Q. It had to use several thousand dollars worth of that current monthly to operate its business, didn't it? A. Yes.

Q. Weren't you several months behind with the P. G. & E? A. We were.

Q. Didn't you owe them twenty-five or thirty thousand dollars at the time of this deal, \$25,000 or

(Testimony of Michael Maffei.)

\$30,000 or \$35,000, somewhere in that neighborhood, and you could not pay it?

A. Not that I know of.

Q. How much money?

A. I think about \$5,000 or \$6,000.

Q. Are you sure? A. I am not sure.

Q. You are not sure about it? A. No.

Q. At the time of the deal there was a bond issue which Merchants Ice & Cold Storage Company had outstanding? A. Yes.

Q. In the principal sum of \$659,000?

A. Right.

Q. That carried 6½ per cent interest, did it not?

A. Correct.

Q. And it took somewhere around \$40,000 or a little better each [202] year to keep the interest paid up? A. That is right.

Q. You paid that interest semiannually, every six months, isn't that true?

A. That is correct.

Q. Requiring something around \$21,000 or \$22,000 each six months to keep it paid, in that neighborhood? A. Yes.

Q. Now, what were the two dates each year that you had to put up the money with the trustee for the bond issue, to pay the interest; when did it fall due? When did you have to put it up with the trustee?

A. I think it was the middle of the year and first part of the year.

(Testimony of Michael Maffei.)

Q. Well, didn't it fall due in October and in April? A. October and April, yes.

Q. And it was required under the indenture to be put up with the trustee a month in advance so as to have it on hand? A. Yes.

Q. The indenture called for that? A. Yes.

Q. So, for practical purposes it fell due in September and March? A. Right.

Q. You had to put it up then? A. Yes.

Q. Now, in September, 1940, when the sum of twenty-odd thousand dollars fell due, you did not have any more unsecured bank credit, did you?

A. We could not get any more credit.

Q. As a matter of fact, as of that time you were selling ice to the City Ice Delivery Company at the rate of \$20,000 a year on daily delivery?

A. Yes—so many tons.

Q. So many tons a day. It ran along pretty uniformly, and there were selling proceeds of around \$20,000 a year? A. More or less.

Q. In that neighborhood? A. Yes.

Q. Now, didn't you in September of 1940—I am speaking now [203] of the Merchants Ice & Cold Storage Company—didn't you and Mr. Arnold have the Merchants Ice & Cold Storage Company assign that ice contract a year ahead in order to get immediately \$20,000 to pay the bond interest?

A. There was something like that at one time; I could not exactly remember the date.

Q. Wasn't it the last time that the bond interest had to be paid up before the deal was made with Mr. Bercut?

(Testimony of Michael Maffei.)

A. I don't remember whether it was or not.

Q. At the time of the sale to Mr. Bercut isn't it a fact that your ice contract for a year ahead was in soak?

A. I don't remember that; I couldn't tell you.

Q. You don't know one way or the other?

A. I don't remember whether it was at that time. I know it was at one time, but I couldn't tell you whether it was that time or before.

Q. Now, of course, in assigning that contract for a year ahead, you spent the money at the beginning of the year and then you had to buy power and pay the payroll and pay for freezing agents for a year to produce the ice?

A. I suppose that we had to do it when we needed it.

Q. I did not ask you that. I am saying, having borrowed the money you would take the \$20,000 that you borrowed and turn it over to the trustee under the bond issue?

A. I don't remember of borrowing \$20,000.

Q. Do you remember how much you did borrow?

A. No, I do not, because I do not handle that myself.

Q. Do you remember whether at the time of the deal with Mr. Bercut taxes owing to the City and County of San Francisco on real property were delinquent?

Mr. Scampini: May it please the Court, I have not made any objection to this line of examination

(Testimony of Michael Maffei.)

because it really [204] does not make much difference on our side, but after all, the best evidence is the books and records, and this cannot be answered by this witness.

Mr. Naus: I am trying to get at the facts. I would remind your Honor that when we were last on trial, three or four times during the direct examination of this witness——

Mr. Scampini: Just a moment, Mr. Naus; there is no direct examination of this witness. Let us have that clear in the record. I called this witness as an adverse witness under Section 43(b) of the Rules of Civil Procedure.

Mr. Naus: If your Honor please, he was not called by me as my witness.

Mr. Scampini: He is not ours.

Mr. Naus: So far as this deal is concerned, there were three or four times during what I call the direct examination of this witness where Mr. Scampini would occasionally ask this witness, "Well, now, don't you find on such a date that the Merchants Ice & Cold Storage showed the value was several hundred thousand dollars, and six hundred or seven hundred or eight hundred thousand dollars"—he was talking about values here and there.

Mr. Scampini: I submit that statement is purely argumentative by counsel and the transcript will indicate no such line of examination on my part.

Mr. Naus: You called attention to the balance sheet of the Pacific Empire Holdings in which the

(Testimony of Michael Maffei.)

stock of Merchants Ice & Cold Storage Company was carried as an asset at some \$500,000, and referred to another item of \$200,000, a total of \$700,000, and asked him whether in his opinion in good faith the Merchants Ice & Cold Storage Company stock was worth that [205] much.

The Court: I will allow the question. Read the question.

(Question read.)

A. There was some delinquent, but as I said before, I didn't handle the affairs of the Merchants Ice & Cold Storage Company; Mr. Arnold handled them, and the exact amount I couldn't tell you.

Mr. Naus: Q. You do know, don't you, generally, approximately, that the tax bill of the City and County of San Francisco with respect to the Merchants Ice & Cold Storage Company was around \$15,000?

A. Whatever it was.

Q. I am asking you. You know that, don't you?

A. Well, yes.

Q. Don't you know at the time of the deal with Mr. Bercut there was approximately \$25,000 taxes owing to the City and County of San Francisco delinquent and bearing delinquent interest?

A. I didn't know that.

Q. Do you know that during all of the time that you and Mr. Arnold were in charge of all these corporations there was not a single year that you and Mr. Arnold had the Merchants Ice & Cold Storage Company that there was ever any net income reported, but always a deficit reported?

(Testimony of Michael Maffei.)

Mr. Scampini: Why ask him? You have the records in your hand.

The Court: Maybe you can arrange it by stipulation.

Mr. Scampini: I will stipulate to nothing. He has the records in his hand. Let him offer the records and they will speak for themselves.

The Court: Very well.

Mr. Naus: Q. My question, Mr. Maffei, is: Don't you [206] know as a fact that annually, while you and Mr. Arnold were running this corporation, annually the Merchants Ice & Cold Storage Company put in a corporation income tax return to the Federal authorities, and during every year of your management it showed an operating deficit?

Mr. Scampini: I object to the question on the ground it is calling for the conclusion of the witness, and the records are the best evidence.

The Court: He may answer if he knows.

Mr. Naus: Q. Do you know?

A. After depreciation, yes.

Q. Naturally, you know that depreciation on physical plant is part of the operating expense of a corporation like Merchants Ice & Cold Storage Company? A. Yes.

Q. You know that, don't you? A. Yes.

Q. Do you recall what rate of interest you were paying on the bank debts of the Merchants Ice & Cold Storage Company? A. On the loan?

Q. Yes.

(Testimony of Michael Maffei.)

A. I don't know whether it was six or seven per cent.

Q. Wasn't it more than that? Are you sure?

A. I am not sure.

Q. Now, also at the time of this deal isn't it a fact that the Bank of America was making a claim against Merchants Ice & Cold Storage, a claim somewhere around \$35,000 or in that neighborhood?

A. Correct.

Q. Because of some phony butter receipts that had been put out?

Mr. Scampini: Let us have all the facts of that transaction, and not his conclusion.

The Court: Develop the facts.

Mr. Naus: Q. Mr. Maffei, the Merchants Ice & Cold [207] Storage Company operated at least as part of its business, or a large part of its business, a public warehouse and issued public warehouse receipts? A. Correct.

Q. Negotiable receipts? A. Correct.

Q. State whether or not at the time of the deal with Mr. Bercut there were outstanding receipts issued by Merchants Ice & Cold Storage Company for butter purported to be on storage with it but for which no butter had been deposited in storage?

A. Well, that—

Mr. Naus: May it please the Court, I ask that the witness be compelled to answer Yes or No.

The Court: He may answer.

A. I don't know whether the butter was ever in

(Testimony of Michael Maffei.)

there or never in there. I could not tell you one way or the other, whether that butter went in or did not go in. I don't know.

Mr. Naus: Q. In any event, when the receipts were tendered there was no butter there; isn't that correct?

A. I don't know how that thing happened.

Q. Do you know whether or not at the time of the deal with Mr. Bercut the Bank of America was making a claim against Merchants Ice & Cold Storage Company? A. Right.

Q. Wasn't the claim based on the assertion that it in the course of business had gotten butter receipts, warehouse receipts, in its hands and had loaned money against them and the receipts had not been honored?

A. Well, it might have been that the butter was delivered before getting the release of the Bank of America by some of the clerks on the inside.

Q. Do you know whether or not that claim had been made some substantial period of time before you made the deal with Mr. Bercut, a long enough period of time to investigate and find out [208] the facts?

A. No, it was shortly before; I think it was just a matter of a couple of months or so.

Q. Do you know whether or not the Merchants Ice & Cold Storage Company finally paid out nearly \$25,000 to settle that claim? A. I don't know.

Q. You don't know anything about that?

A. No.

(Testimony of Michael Maffei.)

Q. Now, those were receipts that were issued to a firm by the name of Bennett & Layton, weren't they?

A. That is right.

Q. You recall, do you not, that the Merchants Ice & Cold Storage Company got a five-year moratorium on the payment of the principal bond issue?

A. That is correct.

Q. That was obtained, was it not, in 1937?

A. That is right.

Q. So that the next installment of the principal would fall due in 1942?

A. That is right.

Q. Do you recall when in 1942 that would be?

A. I think the first part of 1942.

Q. It would be less than a year after the deal with Mr. Bercut, would it not?

A. Whatever that date is.

Q. At the time you sold him you did not know where you could lay your hands on the cash to pay the interest that would fall due in March, did you?

A. That is right.

Q. By the way, in obtaining that five-year moratorium, the expenses for court costs and the like, the trustee and others, amounted to some \$25,000, didn't it?

A. I couldn't say the exact amount; the books will show what the amount was.

Q. I am asking if you have a recollection what it cost you to get that extension of time.

A. I don't know.

Q. Do you recall whether or not, whatever the

(Testimony of Michael Maffei.)

amount was, but assuming for the moment it was \$25,000, that was money that you paid out of expenses to get the extension? There is no [209] doubt about that? A. Correct.

Q. But as a matter of fact, you took the major portion of that expense of \$25,000 and carried it on the asset side of your balance sheet under the name of "Deferred Charges"?

A. I don't know.

Q. You don't recall whether or not after that extension of five years, costing you around \$25,000, that you carried the principal item of the cost as an asset?

A. I don't remember. The statement will show that.

Q. You don't recall it? A. No.

Q. Now, you stated at one time on your direct examination——

Mr. Scampini: I object again to the use of the term "direct examination," may it please the Court, and I submit to your Honor that this is not cross examination.

Mr. Naus: May I proceed with the question, your Honor?

The Court: Read the question.

(Question read.)

The Court: I do not know exactly what the record shows.

Mr. Scampini: It was cross examination of an adverse party.

(Testimony of Michael Maffei.)

The Court: We are confused, I think, sometimes in reference to the scope of examination. Because you call him as an adverse witness does not indicate that counsel cannot go into everything that you went into.

Mr. Scampini: I think your Honor is correct, but when he uses the term "direct examination," he would infer that I called this witness as my witness and I am bound by his testimony.

The Court: Do you have in mind the language in the rule?

Mr. Scampini: The language in the rule 43(b).

Mr. Naus: I do not think the rule supports any such view as that. [210]

The Court: In the interest of time, dispose of the words "direct examination" and you will get the same results.

Mr. Naus: Q. In your examination by Mr. Scampini, who on behalf of the plaintiff called you as a witness, Mr. Maffei, you recall, do you not, that you said that the Merchants Ice & Cold Storage Company stock cost Pacific Empire Holdings around \$250,000? A. Correct.

Q. As I remember it, you made that answer during your examination as though you were stating it from memory, from no paper in your hand.

A. What is that?

Q. Were you stating that from memory at the time you answered the other day?

A. I said I could not give the exact figures, but I thought it was in that neighborhood.

(Testimony of Michael Maffei.)

Q. Now, as a matter of fact, the Merchants Ice & Cold Storage Company stock carried on the assets side of the Pacific Empire Holdings balance sheets was being carried there in the aggregate of around \$700,000, was it not? A. That is right.

Q. That \$700,000, all of that but your figure of \$250,000, was merely a book write-up, was it not?

A. That was according to the report of the Merchants Ice & Cold Storage Company.

Q. I say it was merely a book write-up from cost?

A. I couldn't tell you whether it was a book write-up.

Q. Isn't it a fact that as you bought the various units of this block of Merchants Ice & Cold Storage Company stock that they bought, for example, at \$100,000, you would immediately put that in the books at a write-up amount of \$250,000 or \$300,000?

A. The difference between the cost and the value.

Q. It was a write-up, was it not?

A. It would be.

Q. Now tell me from your memory, Mr. Maffei, as you did with respect to this \$250,000, who you bought it from. Wasn't it [211] largely from McInerney, Vincent, Stratton and Sherman?

A. Those were the biggest blocks.

Q. Now, as a matter of fact, you did not really pay them \$250,000 for it, did you, or do you know what you paid them?

A. Well, the way to find out is from the books.

Q. You did not refer to the books when you gave the figure of \$250,000. I am going to get

(Testimony of Michael Maffei.)

where you took that figure from. Where did you get that figure of \$250,000 in your mind; how did you make it up?

A. I know more or less how much the big blocks cost.

Q. What are you referring to as the big blocks?

A. The Vincent-Stratton block was around \$90,000, and the McInerney stock was around \$80,000—\$75,000 or \$80,000, something like that.

Q. All right, take the Vincent-Stratton block. You say that block cost about what?

A. About \$85,000, between \$80,000 and \$90,000.

Q. Between \$80,000 and \$90,000? A. Yes.

Q. Do you recall that you immediately recorded in the books of the Pacific Empire Holdings that as an asset in the amount of \$250,000, that one block?

A. Well, that was according to the statement of the Merchants Ice & Cold Storage Company, I suppose, not the cost.

Q. I don't know how you arrived at the figure; I am asking you about the fact. You recall that this block of stock that you say you bought from Vincent and Stratton for around \$80,000, that you recorded this in the books of the Pacific Empire Holdings as an asset of the value of \$250,000; do you recall that?

A. Well, I suppose that was put on the books as the value of the stock. [212]

Q. Do you recall that?

A. I don't recall that.

(Testimony of Michael Maffei.)

Q. Do you or not recall that that purchase from them was by way of settlement of a controversy with them?

A. It was a settlement of a note that they owed the company.

Q. A note or an open account?

A. An open account in the books.

Q. It was an open account in the principal sum of \$71,900 with interest around \$5,000, was it not?

A. Yes, it was close to that.

Q. In other words, they turned over the Merchants Ice & Cold Storage Company stock that they, Vincent and Stratton, had in order to wipe out a book debt that they owed the corporation; is that true? A. Yes.

Q. That was money that they had withdrawn from the corporation from time to time in the past while they were in control?

A. How they got it I don't know, but they owed the company that much money.

Q. It was money they owed the company for quite some time, was it not? A. Right.

Q. That was when? When did that occur, what year?

A. I don't know; I think it was around 1932 or 1933, something like that.

Q. Now, as to the McInerney stock, what did you say that cost?

A. That cost us around \$80,000.

Q. Do you recall immediately writing it up in

(Testimony of Michael Maffei.)

the books of the Pacific Empire Holdings for roughly at least what it cost you?

A. I think they put it in the same as the others.

Q. I say do you recall that?

A. I don't recall the date.

Q. But you recall the transaction?

A. I recall it.

Q. As a matter of fact, in acquiring that stock from McInerney [213] you did not at the time of the acquisition pay out any cash for it, did you?

A. At the time we paid him, I think, \$10,000.

Q. As a matter of fact, Mr. McInerney in turn had acquired that stock and given his note to the City National Bank, hadn't he?

A. No, I don't recall that exactly.

Q. Can you recall any cash that Pacific Empire Holdings actually put out to acquire these blocks of stock, the major blocks, from McInerney, Vincent and Stratton and Sherman—can you recall actually any cash they put out at the time except \$10,000?

A. McInerney was paid.

Q. I am asking you now how much cash you put out at the time of acquiring these two blocks of stock.

A. I can't remember how much cash; I would have to look at the book.

Q. Have you any recollection of putting out any more than \$10,000 in cash, if you put out that much?

A. No. We paid McInerney ten or fifteen thousand dollars cash and the balance was paid later, afterward.

(Testimony of Michael Maffei.)

Q. In addition to the \$35,000 that Mr. Bercut paid, he in addition to that had to pay out \$3,950, did he not, to take up some of the stock that you agreed to turn over to him?

A. I don't know.

Q. Have you no knowledge of that?

A. No.

Q. Mr. Maffei, during the management of the Merchants Ice & Cold Storage Company by you and Mr. Arnold, can you recall any time during the entire period when the bonds of the Merchants Ice & Cold Storage Company were bought and sold in the market at par or as much as par?

A. At no time.

Q. They were always well below par, weren't they? A. Yes. [214]

Q. At some stages of your management they were not worth more than \$30 or \$35 on the hundred in the market, were they?

A. Well, before our management they were down to 21, and after our management they went up to 85.

Q. What were the bonds being bought and sold for at the time of the deal with Mr. Bercut?

A. Around 80 or 85.

Q. By the way, at the time of the Bercut deal you personally owned some of the common shares of the Merchants Ice & Cold Storage Company, didn't you? A. Yes.

Q. How many shares? A. 400.

(Testimony of Michael Maffei.)

Q. 400 shares? A. Yes.

Q. Did you sometime after the Bercut deal sell those shares? A. About a week after.

Q. You sold them to Mr. Bercut? A. I did.

Q. At what price?

A. 50 cents a share.

Q. Now, the deal, as I understand you, with Mr. Bercut took place on January 8, 1941?

A. What date did you say?

Q. January 8, 1941.

A. I don't remember the date, because, as I said before, the whole deal was made by Mr. Arnold, and I only met Mr. Bercut one time on it.

Q. You knew at the time it was going on?

A. I knew. Mr. Arnold, he talked to me about it.

Q. He kept you informed from time to time of the negotiations he was having, so you knew the deal was going on?

A. I knew the deal was going on.

Q. That was early in January, 1941?

A. It was about that date.

Q. You turned the property over, the management of the corporation over to Mr. Bercut about a month after, didn't you? It took about a month to make the turn-over, didn't it?

A. I don't recall the date at all. [215]

Q. When did the idea first enter your mind of seeking a rescission of that deal with Mr. Bercut?

A. I don't know. I think Mr. Arnold and Mr. Bercut, about three months before the deal, they were talking about it.

(Testimony of Michael Maffei.)

Q. You misunderstood me. Since the deal you know there was an attempt to have the deal set aside or rescinded; you know that?

A. Yes.

Q. When did the idea of rescinding this deal first enter your mind? A. Which deal?

Q. This Bercut deal.

A. Well, I never had that in my mind at any time.

Q. Did you at some time after the deal with Mr. Bercut ever talk it over with Mr. Scampini?

A. I never talked about the deal with anybody, because I got out of it and I was through.

Q. You got out of what company?

A. The Holding Company.

Q. When did you get out of it?

A. I was out of it—well, I was out of the management from the 1st of December, 1941, but I was in there until the receivership came in, and then I resigned.

Q. You say you were out of the management in December, 1941?

A. I was out of the management. I was doing something else.

Q. Were you putting in any time with the corporation after December of 1941?

A. Very little time.

Q. Have you at any time since the deal, sometime, let us say, shortly before the receivership, ever talked the matter over with Mr. Scampini?

(Testimony of Michael Maffei.)

A. I never have talked it over with him.

Q. Prior to taking the stand as a witness you had never had any preceding talk with Mr. Scampini? A. Never did.

Q. Have you read Mr. Arnold's deposition, by any chance? A. I have not. [216]

Q. Would you tell me whether at any time before the receivership there were one or two or three occasions when you and Mr. Arnold and Mr. Scampini had lunch together? A. We did.

Q. And talked over the affairs of any of the corporations, including the deal with Mr. Bercut?

A. No, we just talked generalities, that is all.

Q. Who succeeded you in the management of the Pacific Empire Holdings?

A. Well, I was not an officer.

Q. You spoke a while ago about going out of the management in 1941, which was the better part of a year, more or less, before the receivership; is that correct?

A. I still was in the company, but I did not have a managing part.

Q. Who was actively managing the corporation?

A. Mr. Arnold.

Q. Up to the time of the receivership?

A. Mr. Arnold.

Q. Merchants Ice & Cold Storage Company never paid Pacific Empire Holdings any dividends during all of that time?

A. That is right.

(Testimony of Michael Maffei.)

Q. The Pacific Empire Holdings owned Merchants Ice & Cold Storage stock, did it?

A. That is right.

Q. Did the Pacific Empire Holdings have any income whatever during the time that you and Mr. Arnold were in the management?

A. Well, the only income was from the laundry in Bakersfield.

Q. Was that in the way of dividends or borrowing money? A. We borrowed it.

Q. I mean aside from borrowing some money, and aside from sales of assets did the Pacific Empire Holdings ever have any income during the time that you and Mr. Arnold were in the management? A. We did not have any income.

Q. No income at all?

A. Outside of the laundry, that is all. [217]

Q. Did the Pacific Empire Holdings own the laundry?

A. They did up to a certain period of time.

Q. What income did you get from the laundry aside from borrowing money from them?

A. I could not say exactly the amount; I would have to look at the books to see.

Mr. Naus: That is all.

Mr. Scampini: No further questions.

The Court: Step down.

Mr. Scampini: I will now ask Mr. Peter Bercut to take the stand. Let the record show we are calling him under Section 43(b) of the Rules of Civil Procedure as an adverse witness.

(Testimony of Peter Bercut.)

Mr. Naus: If your Honor please, counsel has announced he is calling Mr. Bercut as an adverse witness, which he has a perfect right to do, but I do not by my silence acquiesce in the assertion of counsel as to his right to call or how he calls him. He is calling him as a witness, but I do not acquiesce in his view.

PETER BER CUT

one of the defendants, called as a witness for the plaintiff under Section 43(b); sworn.

Direct Examination

Mr. Scampini: Q. Mr. Bercut, your full name, as I understand it, is Peter Bercut? A. Yes.

Q. Is that right? A. Yes.

Q. And your present occupation is what, Mr. Bercut?

A. Well, I am in business, in several businesses.

Q. I know that. Will you please tell us what your activities are?

A. Most of my activities are at the Merchants Ice & Cold Storage Company. [218]

Q. What position do you hold there?

A. President.

Q. When did you first become president?

A. In about February, sometime in February, 1941.

Q. What other business activities do you engage in besides that?

(Testimony of Peter Bercut.)

A. Well, I am president of the Bercut-Richards Canning Company in Sacramento.

Q. Let us see if we can accelerate these business activities of yours by referring you to a letter which has been sent to the stockholders of the Merchants Ice & Cold Storage Company under date of February 19, 1941, which is Plaintiff's Exhibit 19 for identification in the file, and ask you whether or not the signature which appears therein is your signature. A. Yes.

Q. Did you send this letter to the stockholders of the Merchants Ice & Cold Storage Company?

A. Yes.

Q. And as I see, in this letter you advised the stockholders as follows:

“To the Stockholders of the Merchants Ice & Cold Storage Company:

On February 1st of this year your Board of Directors elected a new President and Vice President to direct the affairs of your company in the future. This new leadership is composed of two brothers, namely, Peter and Henri Bercut, whose record for successful management is well known, not only in the State of California, but throughout the entire country. In addition to being the chief executive of your company the new leader is actively the President of the following corporations:

The English Estate Co.: Owning and operating land, orchards and cannery site adjacent to the City of Sacramento. [219]

(Testimony of Peter Bercut.)

The Bercut-Richards Packing Co.: One of the largest packers of fruits and vegetables in the state."

A. That is correct.

Q. "The Markets Investment Co: Owners and lessors of land and market properties."

A. That is right.

Q. "The San Francisco City Calf Skin Co.: Specializing in the selection and cure of calfskins and hides."

A. That is right.

Q. "Bercut Bros. Co.: Operating the Grant Market, in the City of San Francisco, whose volume of business at this location, according to some authorities is not exceeded at any other individual establishment elsewhere in the United States.

The two brothers also own and operate extensive apartment house properties in this city and serve as directors in various associations and institutions.

Their financial stability, their close contacts with the growers, producers, processors and packers of food products are ideally suited to strengthen and utilize the capacities of your properties."

Now, you state here that you also are directors in various associations and institutions. Will you please name the various associations and institu-

(Testimony of Peter Bercut.)

tions of which you were a director and not named in this letter?

A. The Apartment House Association, the City National Bank.

Q. The City National Bank? A. Yes.

Q. How about the Pacific National Bank of San Francisco? A. That is what I answered.

Q. How about the Pacific Empire Corporation?

A. I resigned from them. [220]

Q. When did you resign from the Pacific Empire Corporation?

A. I think it was about April.

Q. What year? A. 1940.

Q. 1940? A. Yes.

Q. How did you resign from Pacific Empire Corporation in April 1940?

A. Verbally. I told Mr. Arnold that I did not care to take any more interest in the company.

Q. Verbally? A. Yes.

Q. That is the Pacific Empire Corporation?

A. I never knew the difference between the two corporations, because they were so mixed. I meant both.

Q. You meant both of them?

A. Yes, sir.

Q. Now, to whom else did you say that you did not want to have any more to do with these companies on or about April, 1940?

A. My accountant told me to resign.

Q. Your accountant told you to resign; is that right? A. Yes.

(Testimony of Peter Bercut.)

Q. I did not ask you that. I asked you to whom else besides Mr. Arnold in these companies, that is, the Pacific Empire Holdings and the Pacific Empire Corporation, you made known your intention not to continue as an officer or director.

A. I told Arnold.

Q. You just told Arnold and nobody else?

A. That is all.

Q. You did not tell anybody else, did you?

A. No.

Q. You never sent in a resignation to either one of the companies later on, did you?

A. Later on I asked for my resignation in writing.

Q. You asked for your resignation first?

A. Yes, and I asked later to give it to me in writing.

Q. Let us get to the bottom of this thing. Did you ever file a written resignation as an officer or director of the Pacific [221] Empire Corporation?

A. Yes.

Q. When did you?

A. When we started to deal on this, I told Mr. Arnold that I would like to have my resignation in writing.

Q. You mean that you told Mr. Arnold you would like to submit your resignation in writing?

A. No; I wanted to resign, but I wanted everything in writing.

Q. You wanted to file it in writing?

(Testimony of Peter Bercut.)

A. I wanted to go on record.

Q. When did you tell that to Mr. Arnold?

A. Just when we were dealing for the purchase of the Merchants Ice & Cold Storage Company.

Q. Isn't it a fact that two or three weeks after the deal was completed you appeared in the office of the Holding Company, the Pacific Empire Holdings Company at 26 O'Farrell Street and dictated to Miss Keener, the stenographer, the resignation?

A. No.

Q. You never did? A. No.

Q. I will show you here Plaintiff's Exhibit No. 26 for identification, and I will ask you to read it and state to the Court whether or not that is your signature at the bottom of the letter.

A. That is my signature. I asked Mr. Arnold that I wanted to have it in writing, and he went into the office and he dictated that resignation himself. I never dictated anything to any of Arnold's stenographers.

Q. Where were you when you said that to Mr. Arnold?

A. I was in the office where the deal was made, Mr. McInerney's library there, that back room.

Q. You mean at 26 O'Farrell Street?

A. 26 O'Farrell Street.

Q. That was the office of the company, wasn't it?

A. No, he told me it was the office of Mr. McInerney. [222]

Q. Is that where they used to hold meetings of the Holding Company? A. Yes.

(Testimony of Peter Bercut.)

Q. Was the occasion upon which you signed this letter after the completion of this deal of January 8, 1941? A. It was before.

Q. It was before? A. Yes.

Q. Are you certain of that? A. Yes.

Q. And about when?

A. About a week before.

Q. I refer you to the answer to my interrogatories which are on file herein, wherein you stated you signed this letter on January 8, 1941. Is that correct? A. Did I say January 8?

The Court: What is the date of that letter?

Mr. Scampini: This is March 30, 1940, your Honor.

Q. I will show you here a reply to a request for the admission of facts which was filed in this proceeding on February 23, 1943, signed by you under oath. That is your signature, is it not?

A. Yes.

Q. Subscribed and sworn to on February 17, 1943? A. Yes.

Q. I refer you to Answer B, wherein you state to the best of the answering defendant's knowledge the document was signed on or about January 8, 1941; is that correct?

A. I was of the impression it was before the deal was consummated.

Q. Before it was consummated? A. Yes.

Q. That is your impression? A. Yes.

Q. Well, now, when did the negotiations for the deal begin, Mr. Bercut?

(Testimony of Peter Bercut.)

A. Along about sometime in December, 1940.

Q. And was the occasion upon which you signed this letter of resignation after the commencement of the negotiations with Mr. Arnold? A. Yes.

Q. But you say it was before they were actually completed, is that right?

A. When I saw that there was a possibility of [223] making the deal, I wanted to make sure I was not a director, because I had resigned to Mr. Arnold orally, and I wanted to be sure it was in writing.

Q. Do you recall signing any letter of resignation to Pacific Empire Corporation of the character that you read here?

A. No, I thought the two of them were the same.

Q. You say you resigned on or about March 30, 1940, by telling Mr. Arnold that you were not going to be a director? A. That is right.

Mr. Naus: He said about April.

Mr. Scampini: Q. About April?

A. About April.

Q. Why did you make that statement to Mr. Arnold?

A. We had difficulty between us two.

Q. What was the difficulty?

A. Well, they were rather personal. I loaned him \$2,000?

Q. Give us all the facts.

A. He kept it some time and I asked him later on about it, and he finally gave me half of it back,

(Testimony of Peter Bercut.)

and then I pressed him some more, and he gave me the other half, and he gave me his postponed check; and things did not look good to me any more, and I said I had better resign from these companies, they didn't look good to me.

Q. What companies are you referring to?

A. I was referring to the two companies. That is why I pressed him at that time.

Q. At this time you were director of the Merchants Ice & Cold Storage Company on or about April, 1940?

A. Yes.

Q. When had you become a director of Merchants Ice & Cold Storage Company?

A. Oh, about two years there.

Q. Two years before?

A. Yes.

Q. You attended the meetings of the directors of the Merchants Ice & Cold Storage Company?

A. Yes. [224]

Q. As a matter of fact, they held meetings, in fact, as your counsel would say, every month?

A. Yes.

Q. You would attend all of those meetings?

A. I was interested.

Q. You were very much interested in the Merchants Ice & Cold Storage Company?

A. Yes.

Q. You were observing how it was improving its position during those two years, weren't you?

A. I did not observe the improvement, but I observed it could be improved.

(Testimony of Peter Bercut.)

Q. Did you ever make any suggestion to the board of directors or at a meeting of the board of directors for the purpose of changing the management of the Merchants Ice & Cold Storage Company so that it could improve?

A. Well, I was new as a director, and I was not the one who was going to tell them how to do it.

Q. Did you ever do anything?

A. Oh, yes.

Q. What did you say?

A. Well, I helped in some things. For instance, Arnold was going to do some business with Moffitt and could not succeed, and so I went there and got some business, and I put the deal over for him.

Q. During the latter part of 1940 the financial condition of the Merchants Ice & Cold Storage Company, according to your counsel, became somewhat aggravated and acute, is that correct?

A. Mr. Arnold put through these reports, and they were so covered that it looked fairly good to the directors, and I was of the impression that it was at the time, but when I took my report to my office and had it analyzed by my accountant, he said, "This thing is not"—

Q. Not so good? A. Not so good.

Q. When were you first told that by your accountant? [225]

A. Well, from the time he first saw the report, he said that.

Q. In other words, you knew for two or three years? A. Yes.

(Testimony of Peter Bercut.)

Q. Did you ever do anything to change it?

A. I was not managing it.

Q. I asked you, Did you ever do anything to change it?

A. I wish I could have done it. I helped every time I was asked.

Q. I asked you, Did you ever do anything as a director of the Merchants Ice & Cold Storage Company or the Holding Company or Pacific Empire Corporation to bring about the change in that?

A. What could a director do? I did the best I knew, but I was not very much help; I was only one of seven directors.

Q. You and Mr. Maffei and Mr. Arnold for a period of years in fact had been running and managing the affairs of the Pacific Empire Holdings and Pacific Empire Corporation——

A. No.

Q. ——and Merchants Ice & Cold Storage Company, weren't you?

A. No.

Q. How much did you have to do with it?

A. I signed in the book when they asked me every six months or so.

Q. In other words, wherever your signature appears in the minute book of the Pacific Empire Holdings as being present and approving the acts and deeds of the officers and directors you would say you were not there?

A. I am sorry to say I was not there.

Q. Would you say that you would sign the minutes as they brought them to you?

(Testimony of Peter Bercut.)

A. Yes.

Q. Did you read the minutes? A. No.

Q. You signed without reading them?

A. I made a mistake, I admit.

Q. Did you do that all the time?

A. All the time.

Q. From the very beginning of your position in the company to the very end?

A. Practically, yes. [226]

Q. In other words, you would approve whatever Mr. Arnold and Mr. Maffei did without ever looking into it? A. Yes.

Q. That is how you performed your duties as director, is that right?

A. That is right. I am a very busy man.

Q. Did you perform the same function with the Pacific National Bank of San Francisco?

A. No; they called the meeting, and sometimes I am there, and sometimes the day of the meeting I would not be there.

Q. Did you approve the meetings of the directors in the same way?

A. Well, I think with these organizations, Mr. Arnold, it looked to me like he was just winding up something which was dead.

Q. You did not care how he took it up?

A. Oh, no.

Q. Do you know how much the Holding Company owed on or about March 31, 1940?

A. Which company?

(Testimony of Peter Bercut.)

Q. The Holding Company, Pacific Empire Holdings.
A. How much they owed?

Q. Yes. A. I don't know.

Q. Did you make any effort to find out?

A. If I did, I would not know anyway.

Q. You would not know anyway?

A. They would not tell me.

Q. In the financial reports that Mr. Arnold put out to the stockholders of the Pacific Empire Holdings, the last one being in May or June of 1940, would you read the financial report? A. Yes.

Q. Then you knew how much the company owed?

A. I knew they were no good.

Q. You would send them out to the stockholders?

A. When I got it, I took it to my office and had it analyzed, and the accountant told me the whole thing was bogus. [227]

Q. What did you do about protecting yourself?

A. I resigned.

Q. When did you resign?

A. I answered that already.

Q. I ask you again, when.

A. I told you, I made a statement as a witness that I resigned about April, 1940.

Q. Now, the same situation prevailed in Merchants Ice & Cold Storage Company, did it?

A. They had meetings anyway.

Q. The same situation prevailed in Merchants Ice & Cold Storage Company?

A. Very much so.

(Testimony of Peter Bercut.)

Q. You did not resign from Merchants Ice & Cold Storage Company?

A. I did not say that I would not.

Q. But you did not?

A. I did not so far.

Q. How did you become a director of Merchants Ice & Cold Storage Company?

A. I think Mr. Maffei and Mr. Arnold put my name up as a candidate.

Q. It was with your consent, wasn't it?

A. Yes.

Q. You agreed to it?

A. I was just proposed and accepted.

Q. You were also an officer besides a director of the Holding Company and Pacific Empire Corporation?

A. At the time that I became a director in the Merchants Ice & Cold Storage Company.

Q. You were vice-president of both of those companies? A. Yes.

Q. Did you resign as vice-president of the Pacific Empire Holdings?

A. Well, I had a verbal resignation, but it did not appear in writing upon the books.

Q. In other words, you just saw Mr. Arnold and said, "I do not want to have anything more to do with the Holding Company or the Pacific Empire Corporation"? A. Yes.

Q. You did not tell Mr. Maffei that?

A. No, I had difficulty seeing Maffei. I asked

(Testimony of Peter Bercut.)

for Maffei every time I went there, and they said, "He is not here" or "He is busy." [228]

Q. Did you ever tell any of the directors that you had resigned?

A. Well, I never talked with any of the directors.

Q. The answer is "No"?

A. No, I did not tell any of the directors. I hoped Mr. Arnold would tell them.

Q. But you never did?

A. No, I did not say that.

Q. In minute book No. 5, at page 100 of the minutes of the Pacific Empire Holdings, Inc. there is reported a meeting of Pacific Empire Holdings, Inc. held October 17, 1940, at which it is stated that the following members were present and acting: M. Maffei, L. R. Arnold and Peter Bercut. Do you recall any such meeting? A. No.

Q. You were not there? A. No.

Q. So you would say that these minutes are false, is that right? A. Yes.

Q. You were not, you say, a director of the Holding Company on that date? A. No.

Q. But you had not made a written resignation?

A. What was the date of that?

Q. October 17, 1940.

A. Did I sign those minutes?

Q. No, you did not. When did you first become associated with Pacific Empire Holdings, Inc.?

A. I think I was with the Calitalo.

Q. That was away back in 1931 or 1932?

(Testimony of Peter Bercut.)

A. Yes.

Q. You were director of the Holding Company when they took over this stock of Stratton, Vincent and McInerney? A. I think I was.

Q. And of course you know it cost around \$300,000 or \$400,000 for that block of stock, don't you? A. No.

Q. What did it cost?

A. Well, I understood it cost 50,000.

Q. You understood? A. I know it. [229]

Q. Will you please state how you know it cost around \$50,000?

A. Well, the stock was bought from the Anglo Bank, and I found out later that they paid 50,000.

Q. Let us see if I understand. Whom did it cost 50,000—Vincent and Stratton? A. Yes.

Q. I am talking about the Holding Company; what did the Holding Company pay them?

A. I thought the question was that you meant the original cost.

Q. The original cost to Vincent and Stratton?

A. Yes.

Q. You mean they bought it for \$50,000?

A. And they wrote it down in the books for \$250,000.

Q. Vincent, Stratton, McInerney and Sherman while you were an officer and director sold the stock to the Holding Company?

A. Yes, they did that themselves.

Q. But you approved the minutes, didn't you?

(Testimony of Peter Bercut.)

A. Well, I suppose I did. I am sorry I did.

Q. The minutes show that is what you approved, isn't it?

A. Well, when men like this are making a deal, and I am a director, I approve them, and that is all I was there for, to approve.

Q. You were quite a big stockholder in the Holding Company, weren't you?

A. Yes, sir.

Q. How many shares did you own?

A. I think about 15,000.

Q. You were a stockholder in Pacific Empire Corporation, too, were you not?

A. They changed the name and I became a stockholder.

Q. You were a stockholder of the City National Bank originally, weren't you? A. Yes.

Q. You changed that stock for Pacific Empire Corporation? A. Yes.

Q. That is how you became an officer and director of Pacific [230] Empire Corporation?

A. I changed my stock.

Q. You lost thousand of dollars by the management of the directors?

A. They never had anything; they just took the money from the stockholders.

Q. Of course, all these companies were looted?

A. They looted me.

Q. Were you a stockholder of Merchants Ice & Cold Storage Company when you became a director?

(Testimony of Peter Bercut.)

A. Yes.

Q. How many shares did you own?

A. I think 2,000.

Q. You got them from Frederick Vincent?

A. No, I got them from you.

Q. You mean I filed suit for you and got the stock for you? A. Yes.

Q. It was against Frederick Vincent, and that is how you got it?

A. Mr. Maffei told me you were the only person who knew where the stock was hiding.

Q. He was right?

A. He must have been.

The Court: We will take a short recess.

(After recess:)

Mr. Pardini: If your Honor please, the defendant Maffei is engaged in work, which is the selling of fruit, and he would like to be absent from the session, but he will be subject to call if either party wants him.

The Court: Is that agreeable?

Mr. Scampini: That is agreeable.

Mr. Naus: That is agreeable.

The Court: Very well.

Mr. Scampini: Q. You stated, Mr. Bercut, that you had difficulty with Mr. Arnold. Have you told all of the difficulty that you had with Mr. Arnold?

A. Yes. [231]

Q. Is that all?

A. Well, he was hard to find. Sometimes he was

(Testimony of Peter Bercut.)

there and they would say he was not there, things I did not like.

Q. The only real difficulty that you had, you say, with Mr. Arnold was that he owed you money?

A. Yes.

Q. That is the only one?

A. Yes; I don't know of any other.

Q. Did Mr. Arnold ever visit you at your packing plant up at Sacramento during the latter part of 1940? A. No, I think it was in 1939.

Q. What was he doing up there when he came up to visit you?

A. He was just interested in my activities and I showed him the plant.

Q. Was he doing some work for you?

A. No.

Q. Did he ever do any bookkeeping for you?

A. No.

Q. You and Mr. Arnold were very close, weren't you? A. No.

Q. Didn't you discuss your mutual problems together? A. No.

Q. Are you sure you never did?

A. No, my problems, I did not discuss them with Mr. Arnold.

Q. Didn't you discuss the problems of the Holding Company with him?

A. No, except he told me once in a while that McInerney was making trouble for him; that is, he said McInerney was threatening him, and he was

(Testimony of Peter Bercut.)

getting nervous, and he said, "I owe him \$10,000 and he threatens to foreclose," and I said, "Well, if you get four men with myself I am willing to put up \$2,000 for you," and I tried to straighten him out on that, and then I myself got the worst of it.

Q. In the latter part of 1939, or rather 1940, did he visit you often at the packing plant at Sacramento? A. No, he only did once.

Q. He was only there once? A. Yes. [232]

Q. By the end of 1940 isn't it a fact that the only assets, substantial assets, that the Holding Company and Pacific Empire Corporation had left was this block of stock in Merchants Ice & Cold Storage Company?

A. They never had anything at any time.

Q. In the latter part of 1940 they had this block of stock in Merchants Ice & Cold Storage Company, didn't they?

A. Apparently not; it was mortgaged.

Q. You mean to say it was pledged to the Pacific National Bank of San Francisco?

A. That is what I found out when I bought the stock.

Q. But you knew that all the company had left was this block of stock, didn't you?

A. No, I didn't know that. They had the laundry at Bakersfield.

Q. You knew that they had already sold half of the laundry, didn't you? A. No.

Q. You didn't know that? A. No.

(Testimony of Peter Bercut.)

Q. If the minutes indicate that you signed the approval of the sale to Mr. McInerney, do you say that you did not know anything about it?

A. Well, if it was in the minutes, I didn't know.

Q. Did you make any effort to find out what the company owned during the latter part of 1940?

A. No. My judgment was they owned nothing.

Q. Your judgment was that they owned nothing?

A. Yes.

Q. By that you mean that they did not own Merchants Ice & Cold Storage stock?

A. I knew there was a company without funds.

Q. You mean without assets?

A. Without assets, too.

Q. But you knew that the company owed a lot of money, didn't you? A. No.

Q. You didn't know about the loans that the Holding Company had [233] made? A. No.

Q. Did you make any effort to find out how much it owed?

A. No, that was not my business; that was Maffei's and Arnold's business, and Arnold was a liquidating man, that is what he was. I just knew that sooner or later that would be liquidated and he would be out.

Q. You also figured that sooner or later he would liquidate the block of stock in the Merchants Ice & Cold Storage Company?

A. I knew the whole thing would be liquidated, because there was no income into the place; it was

(Testimony of Peter Bercut.)

just a lot of expense, maintaining an office and employees, and to maintain something like that you have to have income, and if you do not have income the whole thing would be liquidated.

Q. Knowing that they had to liquidate the assets, did you as a director of the company make any effort to get the best possible price?

A. No, I was not the liquidating agent.

Q. You were a director?

A. I was a director and I was hoping to get out and did get out.

Q. When was it that Mr. Arnold or Mr. Maffei first approached you on this deal which took place on January 8, 1941?

A. I have already testified to that.

Q. State it again.

A. Sometime in December 1939.

Q. 1939 or 1940? A. 1940; pardon me.

Q. Who approached you? A. Arnold.

Q. What did he say?

A. Well, it started this way: that we had a stormy meeting at the Merchants Ice & Cold Storage Company. One of the directors made the statement that he was not satisfied with the management of the company, and there was only one man on this whole board that they thought could run this plant.

[234]

Q. Who was that man?

A. He said Peter Bercut.

(Testimony of Peter Bercut.)

Q. Who was that director that made that statement?

A. Mr. Schinneller. He was representing a certain amount of bondholders.

Q. Wasn't Mr. Morris, former president of the Bank of America, chairman of the board of directors at this time?

A. Mr. Morris was not president of the Bank of America—I think he was vice-president.

Q. Whom did he represent on the board?

A. I have not finished my answer.

Q. Whom did he represent?

A. You were asking me the question when Mr. Arnold first spoke to me and I was going to tell you.

Q. All right, proceed.

A. He said at that time, he told me, "You know, Mr. Schinneller made the remark at the last meeting" that I should be manager of the company, or something of that kind; so I said, "I am very sorry he said that, because it is nothing for me; I am not looking for a job, I am not looking for anything; I am satisfied to be one of the directors." Then he said, "We want to sell our stock, the majority stock or controlling stock," and I said, "Well, I don't know if I am interested or not." Well, he told me that he himself never made a success of it for fifteen years, and they could not make a success, and maybe I could. And I said, "What is your figure? What do you expect for it?" And he said, "\$50,000." And then negotiations stopped there, and I said, "I will let you know."

(Testimony of Peter Bercut.)

Then he called me again, and I went there, and he said, "Will you make an offer?" And I made an offer of \$35,000, and I went away again. And he called me again, and then I came up [235] and the third time that I came there was news that there was fraud in the butter or something of that kind; it was already in the estate, you know, and I heard about it, and I said, "This looks like a bad mix-up; I am going to stay out of it." And then he said he tried to settle the case himself so as to get me interested again, so he went down to the Bank of America and he offered to settle for \$38,000 if they gave him a long time to pay, a couple of thousand a month, in order to satisfy me. But anyway, I was not interested any more, so I went away for a whole month; I went to Los Angeles, and I stayed there a whole month, and then I came back and made inquiry about how much the loss would be, and he *told it* would be between \$30,000 and \$40,000, and I finally made an offer, and he took me down to the bank and gave me the stock and made the bill of sale and everything, and I thought that was all right, so I said, "Now you have all these matters settled between yourself and Mr. Maffei, and I want to see Mr. Maffei and tell him," and he said he had a perfect right, and they were willing and they would go all through the negotiations that would be necessary.

Q. Did you see Mr. Maffei? A. Yes.

Q. When Mr. Arnold first approached you he asked you for \$50,000? A. Yes.

(Testimony of Peter Bercut.)

Q. For all the stock or half the stock?

A. No, he told me all of the stock.

Q. 50,000 for all of the stock? A. Yes.

Q. Are you sure? A. Yes.

Q. Did he offer to sell you half of the stock for \$50,000? A. No.

Q. Why weren't you willing to accept the suggestion that you become president of the Merchants Ice & Cold Storage Company? [236]

A. My experience in business tells me unless you have control and you can't handle it without too much interference from people that have no experience, you cannot have success.

Q. When it was suggested that you become president, you would not be interested unless you had control of the Merchants Ice & Cold Storage Company; is that right? A. Yes.

Q. When Mr. Arnold approached you to buy this control, you say he offered to sell to you for \$50,000 and you made him an offer? A. Yes.

Q. How much did you offer?

A. \$35,000. I never changed.

Q. You, of course, felt when you were offering \$35,000 that you could not offer any more for that stock and make a good deal for Peter Bercut even at that?

A. In business dealings that I do I try to get the best price. Everybody advised me against it—my brother, my wife, my friends, even my attorney told me, "Stay away from this; you are looking for trouble; it is a bad mix-up."

(Testimony of Peter Bercut.)

Q. When you were negotiating with Mr. Arnold you were only interested in getting this block of stock at the least possible price that Mr. Bercut could get it for; is that right?

A. That is the way I do business.

Q. You were not interested in the Holding Company or Pacific Empire Corporation getting as much as they could for the stock, were you?

A. Yes, I was. I told Arnold at the time of the deal—he said he wanted to save something for the companies, so I said, “I give you the privilege of buying back 20,000 shares at 50 cents a share and give you two years to do that, and I am sure if I am successful the 20,000 would be worth more to you and your company than the whole thing today.” That was my statement. [237]

Q. Who inserted in the contract that was finally signed the clause that the option could not be assignable by the company?

A. The whole contract was discussed back and forth, and that was my suggestion that that 20,000 shares was for the benefit of the stockholders of the company.

Q. How did you expect the Holding Company to exercise the option when you made the statement that the Holding Company had nothing?

A. They could have something if it was successful.

Q. Why did you want to prevent the company from assigning the option?

(Testimony of Peter Bercut.)

A. Because I knew it would be a valuable asset to the company some day, and Mr. McInerney if he got it would not do any good for the company.

Q. You were quite sure when you got that block of stock that it would be worth some money?

A. I was going to try to make it worth some money.

Q. In your opinion that 65,860 shares of common and 12,495 shares of preferred stock, what is it reasonably worth today?

Mr. Naus: Object to it as immaterial what it is worth today.

The Court: I will allow it.

A. I am still buying stock for 50 cents.

Mr. Scampini: Q. I am asking you what in your opinion the 65,863 shares of common stock and 12,495 shares of preferred stock which you acquired by reason of this contract are reasonably worth today.

A. I have no way of knowing. It would be only a guess, and a guess is not any good.

Mr. Naus: The answer was he was buying that at 50 cents a share.

Mr. Scampini: But that does not determine the value of the stock. [238]

The Court: He says he does not know the value.

Mr. Scampini: Q. You don't know the value of the stock?

A. It all depends on how successful I will be in maintaining the business.

(Testimony of Peter Bercut.)

Q. For what price would you sell this stock, I am asking you?

A. If I were to sell it—I would not have bought it if I were to sell it; I did not buy it for speculation. I bought it to build a company that the stockholders would be proud of and could get something out of it.

Q. Would you take a million dollars for it?

A. No, I am not selling it today.

Q. You would not sell it for a million dollars?

A. Not selling it.

Q. You would not sell the stock for a million dollars, would you?

A. I don't think I would be doing justice to my stockholders by selling it.

Q. But you would not take a million dollars for that stock?

A. I don't think I will answer that.

Mr. Scampini: Might I ask that he answer?

The Court: It is speculative.

A. They are not offering me that money.

Mr. Scampini: Q. Who put that clause in the contract that in the event the company should exercise the option you could have a voting trust, a voting right for seven years?

A. For the same reason I said before, that unless I had free action, free management to be able to manage the business according to my own judgment, I could not do any good for the company.

Q. So you would not give the company an option

(Testimony of Peter Bercut.)

for 20,000 shares unless that option was not assignable and if exercised you had the voting right for seven years?

A. Well, I understand that [239] it is in the contract, but it could be revoked any time.

Q. I mean, that is the way you felt about it at the time?

A. I thought it would take seven years to make a success of it.

Q. How much did the Merchants Ice & Cold Storage Company earn in 1942, in profit?

A. That is a matter of accounting. My bookkeeper can answer that.

Q. Have you any information; do you know?

A. I would not know at all. You put my accountant on the stand and he will tell you everything.

Q. It is true, is it not, that as soon as you went into the management of the Merchants Ice & Cold Storage Company that the company began to prosper?

A. Not that soon.

Q. How long? Two or three months?

A. The time that it takes to do business and put confidence into your company, and notify the customers that they will be taken care of by somebody that is responsible.

Q. But the company began to improve soon after you got in?

A. As I expected it would.

Q. You expected it would when you were negotiating for this block of stock?

(Testimony of Peter Bercut.)

A. I was going into a business that I expected to make a success of. I am not in the habit of making a failure.

Q. In other words, when you were negotiating for this block of stock you were of the opinion that it would have an increased value with a change in management?

A. I don't think I would have bought it if I didn't think so.

Q. Did you make any effort while you were director of the Merchants Ice & Cold Storage Company and the Holding Company and the Pacific Empire Corporation and an officer of them to bring about a change in the management?

A. I will tell you [240] this: If a man was what you would call I will say a genius, if you want to, for that purpose, unless he is free to do business he can't do anything. Suggestions do not make any help. If I would say, "This is best for your business," you would not do it anyway.

Q. I asked you, Mr. Bercut, whether while you were a director and officer of the Holding Company and of the Pacific Empire Corporation and of the Merchants Ice & Cold Storage Company prior to the time that you got the block of stock from Mr. Arnold, did you make any effort to bring about a change in the management of the Merchants Ice & Cold Storage Company so that it could improve its condition?

A. No, Mr. Arnold and Mr. Maffei put me there

(Testimony of Peter Bercut.)

and I was not going to try to place them out; I had plenty to do otherwise. If I did not have the Merchants Ice & Cold Storage Company it would have been all right.

Q. In other words, you were perfectly willing to let things go along as they were as long as you did not own a majority of the stock?

A. Not exactly. I feel that unless you are asked to suggest and they want you to help, there is no reason to impose yourself on other people's management.

Q. You remember when Mr. Scampini resigned from the Pacific Empire Corporation in 1936, don't you?

A. No. I did not even know you were ever a director.

The Court: We will take a recess now until two o'clock.

(Thereupon a recess was taken until 2:00 p. m. this date.) [241]

Tuesday, May 4, 1943—2:00 P. M.

PETER BER CUT,

recalled.

Direct Examination
(resumed)

Mr. Scampini: Q. Mr. Bercut, who was present at the time that the agreement dated January, 1941, was made, and where was the agreement dated Jan-

(Testimony of Peter Bercut.)

uary 8, 1941, actually signed, that is, Plaintiff's Exhibit No. 22?

A. It was signed up at the office at 26 O'Farrell Street.

Q. Who was present?

A. Maffei and Arnold and myself.

Q. Why did you not sign at the bottom, "Accepted and approved"?

Mr. Naus: Mr. Scampini, you mean on that particular paper, or all the papers? There was more than one copy, I understand.

Mr. Scampini: I don't know.

A. Only the seller has to sign. I am not the seller. I have not to sign.

Q. How many copies did you sign?

A. Only one.

Q. That is this one here?

A. I think so.

Q. Was Mr. Maffei there at the time?

A. Yes.

Q. Did Mr. Maffei sign this letter of agreement outside of your presence? A. No.

Q. What was said at the time that you and Mr. Arnold and Mr. Maffei signed this agreement?

A. Mr. Maffei wished me good luck. He said, "I hope for your good success."

Q. What did Mr. Arnold say?

A. The same thing.

Q. What did you say?

A. I don't remember exactly. There was a con-

(Testimony of Peter Bercut.)

versation, but I can't recall the exact words. It was something to that effect. I think one thing I remember that Arnold said was, "I suppose my job goes with it, too."

Q. What did you say?

A. I said, "Yes, I couldn't use you." [242]

Q. How much did you pay for this block of stock?

A. \$35,000.

Q. Of that, \$25,000 was paid back to the Merchants Ice & Cold Storage Company, is that right?

A. Yes. I didn't tell them how to use the money when I paid it, but he said that \$25,000 should go to the Merchants.

Q. It is specified in the contract, isn't it?

A. I inquired why, and he said, "I want to make them a present."

Q. Make a present?

A. So I said, "Well, I don't understand what you mean as a present," and he gave me to understand that they owed that much money that they had drawn from the other business.

Q. Is that the first time you found out that the Holding Company had drawn money from the Merchants Ice & Cold Storage Company?

A. Yes.

Q. When you went in there had you investigated the books to see what it was, the relationship between the Merchants Ice & Cold Storage and the Holding Company?

A. I never investigated any books. I had an accountant do this.

(Testimony of Peter Bercut.)

Q. Did your accountant make any report to you?

A. Yes.

Q. Did you find any indebtedness owing to the Merchants Ice & Cold Storage Company from Mr. Arnold?

A. Well, it took months to find out that there were some charges, that it was charged back to the company. That was all an accounting business.

Q. When your accountant got through, how much did you find that Mr. Arnold had drawn down from the Merchants Ice & Cold Storage Company?

A. Quite a lot of money, but I will leave that to the accountant.

Q. That was many thousands of dollars, was it not?

A. Yes.

Q. Mr. Arnold had taken that money for his personal account, hadn't he?

A. I don't know. When we found an interest [243] charge to the Merchants, we promptly wrote a letter to Mr. Arnold to see which company would be charged with that amount.

Q. Mr. Bercut, isn't it a fact that you found many, many checks issued by the Merchants Ice & Cold Storage Company to Mr. Arnold and endorsed by him?

A. I didn't look over the checks myself.

Q. Did you ever hear anything about it?

A. No. The business was between the companies, that is what I understand.

Q. As a matter of fact, you found that Mr.

(Testimony of Peter Bercut.)

Arnold had taken money from the Merchants Ice & Cold Storage Company and then charged it to the Holding Company, didn't you?

A. No, I didn't find anything. I have a book-keeper and accountant, and you can put him on the stand and he will tell you all about it, because I can't testify to something I don't know.

Q. Who was on the board of directors of the Merchants Ice & Cold Storage Company—I mean now?

A. I think mostly all of the same directors—Mr. Schinneller, if I can remember. Mr. Anderson—well, I don't know. We have a list of them.

Q. Mr. Morris is still a director of the company?

A. No.

Q. When did he cease being a director?

A. When I came in.

Q. State the circumstances under which he ceased being a director of the company.

A. Well, he was too expensive. He charged \$250 a month for a member of—what do you call it?

Mr. Naus: Q. Chairman of the board?

A. Chairman of the board. And I knew that the company could not afford it, and I told him he was all through; it was not for myself, the company could not afford it.

Mr. Scampini: Q. Was there a meeting between you and Mr. Morris and Mr. Arnold at the Commercial Club? Is that this transaction?

A. Yes, that is where I told Mr. Morris. [244]

(Testimony of Peter Bercut.)

Q. What else did you say to Mr. Morris at that time?

A. Well, we had a conversation, but I don't recall what was said.

Q. Do you remember anything besides that which you have just told us?

A. Well, that would be a conversation that I would not remember the exact words.

Q. Let me see if I can refresh your memory. At this meeting is it or is it not true that you advised Mr. Morris of the fact that you had acquired the controlling interest in Merchants Ice & Cold Storage Company?

A. He knew about it; I didn't tell him. Arnold told him.

Q. At this meeting is it or is it not true that you stated to Mr. Morris that you and Mr. Morris and Mr. Arnold could make a lot of money by buying the stock cheap and the bonds cheap and conditions were going to improve and everybody would make some money?

A. No, I am not in that business. I did not buy the business to speculate on stock or bonds, because that is not my line of business.

Q. Is it or is it not true that you made that statement to Mr. Morris? A. No.

Q. You say you did not make that statement?

A. No.

Q. You are sure of that? A. Yes.

Q. Is it or is it not true that Mr. Morris said to you he did not do business that way?

(Testimony of Peter Bercut.)

A. Nothing like that took place. I don't do business that way either.

Q. Have you been acquiring any other stock of the Merchants Ice & Cold Storage Company since you became president down there?

A. Yes, sometimes.

Q. How many thousands of shares have you picked up? A. I would not know.

Q. Quite a few, haven't you? A. Yes.

[245]

Q. Both common and preferred, haven't you?

A. When somebody offers it I make an offer for it, and if they give it to me I take it.

Q. You put in a bid for it as cheaply as you possibly can get it; is that right?

A. No, I do not put in any bid. They offer the stock to me and I say I will give so much, and if they do not give it to me they give it to somebody else.

Q. Who is the broker who picks up the stock for you?

A. I have no broker. The brokers call me.

Q. As a matter of fact, haven't you done a lot of business through the brokerage firm of F. M. Brown & Company? A. No.

Q. Have you done some business through them?

A. I think I bought one small block.

Q. Have you picked up quite a few bonds since you became president down there?

A. I bought some.

(Testimony of Peter Bercut.)

Q. You bought them on the market?

A. Yes.

Q. At what price?

A. Well, I bought the first at 55, and then they have gone up practically—they are par now.

Q. Every time you had an opportunity to buy some bonds you would pick them up, wouldn't you?

A. Yes.

Q. I thought you made the statement that you did not engage in business like that.

A. That is an investment, and I know when I am running a business how the business is conducted, and it is a safe place for me to invest.

Q. From whom have you bought bonds?

A. Whoever offered them to me.

Q. Did you buy them from F. M. Brown & Company?
A. From F. M. Brown & Company?

Q. You have a standing order with F. M. Brown & Company to buy bonds for you, haven't you?

A. No. [246]

Q. Have you any standing order to buy preferred stock?
A. No.

Q. F. M. Brown & Company have executed quite a few orders for you, haven't they?

A. They did not buy any stock for me; they bought bonds for me.

Q. When did you first start to accumulate, buy up some of these bonds?
A. A long time.

Q. As soon as you got in there as president?

A. Not as soon as I did, no.

(Testimony of Peter Bercut.)

Q. Soon thereafter? A. Soon thereafter.

Q. The company itself was showing good prospects, is that right?

A. Well, I hoped it would after I run it, and usually it does all right.

Q. If you were not running it, it would not do so well, would it?

A. No. I put in a lot of time running that business.

Q. How much experience did you have in the cold storage business before you took over the management?

A. All my life I have dealt with merchandise kept in storage or otherwise.

Q. Have you ever run a cold storage plant?

A. No.

Q. This is the first time?

A. As a business that is all in the same line.

Q. The business was there, wasn't it?

A. No.

Q. Just a case of management?

A. No, the business was not there.

Q. Did you bring in some new business?

A. Yes.

Q. How much business did you bring in?

A. Well, it is all accounted for; you can see it in the books.

Q. Why didn't you bring the business in when you were a director?

A. When I was a director, suppose I went to

(Testimony of Peter Bercut.)

Swift & Company or Armour & Company, they would want to find out the condition of the premises, and who was managing the company, and how much [247] money they had in the bank, and they would demand a report—what you call a statement—to see if their merchandise is going to be safe, the bills will be paid and the cold storage allowed to run; and where the P. G. & E. threatened to close the account, and the butter didn't appear promptly, and that made it very bad, and as a director I could not say to the company, "Everything is going to be all right," they would not give me much business.

Q. Mr. Bercut, I ask you, Why didn't you have the same interest to stimulate business for the company so long as you were only a director as you have now that you own or control the company?

A. I did not have the say.

Q. You did not have the same interest, did you?

A. I don't see what you mean by that. I was wishing that the business would be good; I had some money in it, and I was a stockholder. I was hoping that they would make it good.

Q. You also had a lot of money in the Holding Company, didn't you?

A. I forgot about that a long time ago. I figured it was lost.

Q. You were also a representative of the stockholders of the Holding Company, weren't you?

A. I protected them as much as I could on that deal.

(Testimony of Peter Bercut.)

Q. What did you do to protect the stockholders?

A. I told Mr. Arnold that the 20,000 shares would be worth more in two years than the whole thing was worth at the time I bought it.

Q. You gave him an option that you knew they could not exercise; is that right?

A. I didn't know that.

Q. You knew what the financial condition of the company was? How could they exercise the option?

A. I prevented them [248] from selling it to the stockholders, because I was protecting the stockholders, like I testified to this morning. I did not want the stock to go into the hands of Mr. McInerney or some people who would not do anything for the company.

Q. Is that the extent of your protection for the stockholders of the Pacific Empire Holdings? Is that the extent? A. What more could I do?

Q. Mr. Bercut, you could have gone in and managed the Merchants Ice & Cold Storage Company without buying the stock, couldn't you?

A. No, I could not run the Merchants Ice & Cold Storage Company without having some say, some responsibility.

Q. They offered you to be president, didn't they?

A. That isn't all they needed.

Q. You had to have control before you went in and managed it?

A. I guaranteed to the bank—in order to get

(Testimony of Peter Bercut.)

further bank credit I guaranteed credit to \$90,000 or \$100,000.

Q. Why didn't you guarantee before you got control of the stock?

A. I couldn't guarantee somebody else's business. What would you do? Is it good business to do that?

Q. You mean you guarantee it now because you think it is your own business?

A. No, because everything is going to be all right; there is going to be no more loss in butter, and I put it on a business basis.

Q. Why didn't you put the affairs of the Holding Company and the Pacific Empire Corporation on a business basis?

A. I was not the manager; I had nothing to do with it.

Q. You were one of the directors.

A. But that doesn't make me manager.

Q. Did you ever make an effort to improve the business conditions of the Holding Company so long as you were an officer or director? [249]

A. I didn't know what business they had.

Q. You did not make any effort to find out when you were an officer or director?

A. All that company was was a company without any money and without any business.

Q. But you felt by giving them an option back on 20,000 you were protecting the stockholders of the Holding Company, is that it?

(Testimony of Peter Bercut.)

A. That is right.

Q. Why didn't you give them an option back to buy some of the preferred stock?

A. I didn't do that.

Q. Why didn't you offer it, if you were protecting the stockholders?

The Court: The ultimate fact is he did not do so.

Mr. Scampini: Q. When you got into the Merchants Ice & Cold Storage Company did you find there 500 shares of stock of the Frostrcraft Corporation? A. No.

Q. Didn't the Merchants Ice & Cold Storage Company own 500 shares in Frostrcraft Corporation?

A. I do not think so, but you can find out from the accountant.

Q. Do you now own 500 shares of Frostrcraft Corporation? A. No.

Q. Are you sure you do not own it?

A. No, I don't.

Q. You are positive?

A. I don't think I own it.

Q. At the time you became president of the Merchants Ice & Cold Storage Company you did not find 500 shares of Frostrcraft in the treasury of the company and transfer it over to the name of yourself and Henri Bercut?

A. I don't remember exactly. Any transaction of that kind would all be in the books.

Q. Have you got the earnings statement of the

(Testimony of Peter Bercut.)

Merchants Ice & Cold Storage Company for the years 1941 and 1942?

A. I think my attorneys have it.

Mr. Scampini: Counsel has handed me a Merchants Ice & Cold [250] Storage profit and loss statement as of December 31, 1941 and one as of December 31, 1942, and I will ask that they be marked as exhibits next in order for identification for plaintiff.

(Profit and loss statement of December 31, 1941, marked "Plaintiff's Exhibit 28 for Identification"; profit and loss statement of December 31, 1942, marked "Plaintiff's Exhibit 29 for Identification.")

Mr. Scampini: Q. Mr. Bercut, I show you here what your counsel turned over to me as the profit and loss statement of the Merchants Ice & Cold Storage Company for the year ending December 31, 1941, Plaintiff's Exhibit No. 28 for identification, in which for that year's operation there is reported a net profit before depreciation of \$79,782.43, and after provision for depreciation it amounts to \$75,286.93, and you still show a net profit for the year of \$4,495.50. Is that the actual earnings of the company for that year, to the best of your knowledge?

A. Yes.

Mr. Scampini: I ask that this be marked as plaintiff's exhibit next in order in evidence.

The Court: Let it be admitted and marked.

(Plaintiff's Exhibit 28 for identification was received in evidence.)

(Testimony of Peter Bercut.)

PLAINTIFF'S EXHIBIT No. 28

Merchants Ice and Cold Storage Company

PROFIT AND LOSS STATEMENT

AS OF DECEMBER 31, 1941

Operating Revenues:

Storage	\$384,812.86
Ice Sales	52,924.75
Rent, Power Sales, Misc.....	15,861.65

Total Operating Revenues.....	453,599.26
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Operating Expenses:

Labor	161,845.68
Power, Light, Water.....	42,002.43
Maintenance, repairs	10,037.00
Taxes	28,935.47
Insurance	8,017.26
Salaries: Officers, Clerks.....	21,698.99
Provision for uncollectible accounts..	21,823.06
Miscellaneous	288.70

Total Operating Expenses.....	294,648.59
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Administrative Expenses:

Soliciting, Automobiles, Misc.....	5,158.04
Miscellaneous, Stationery, Telephone & Telegraph, etc.....	9,874.74

Total Administrative Expenses.....	15,032.78
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Total Expenses	309,681.37
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Profit from Operation Before Depreciation.....	143,917.89
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(Testimony of Peter Bercut.)

Other Income Credits:

Dividends	1,473.20
Miscellaneous credits	4,191.64

Total	<u>5,664.84</u>
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Gross Income Before Depreciation.....	<u>149,582.73</u>
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Other Income Charges:

Bond Interest	42,867.50
Other Interest	6,429.68
Amortization of bond discount & expense	4,348.14
Uncollectible notes written off.....	13,399.45
Miscellaneous losses on equipment, etc.	2,755.53

Total	<u>69,800.30</u>
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Net Profit Before Depreciation.....	79,782.43
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Provision for Depreciation.....	<u>75,286.93</u>
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Net Profit for Year.....	<u>4,495.50</u>
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[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22339.
Filed 5-4-43. Walter B. Maling, Clerk. By J. P.
Welsh, Deputy Clerk.

Mr. Scampini: Q. I show you here Plaintiff's Exhibit 29 for identification, which appears to be a profit and loss statement for the year ending December 31, 1942, wherein it is reported that the net profit before depreciation for that year amounted to \$233,526.66, and after allowing \$77,124.68 for depreciation you still show a net profit of \$156,401.98.

(Testimony of Peter Bercut.)

Is that the correct profit earned by the company that year? A. Yes.

Q. After all charges; is that right?

A. Yes. [251]

Mr. Scampini: Now I ask that this be marked plaintiff's exhibit next in order.

The Court: It may be admitted and marked.

(Plaintiff's Exhibit 29 for identification was received in evidence.)

PLAINTIFF'S EXHIBIT No. 29

Merchants Ice and Cold Storage Company

PROFIT AND LOSS STATEMENT FOR THE YEAR

ENDING DECEMBER 31, 1942

Operating Revenues:

Storage	\$744,286.52
Ice Sales	66,863.93
Rent, Power Sales, Etc.....	35,670.61

Total Operating Revenues.....	846,821.06
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Operating Expenses:

Labor	324,880.31
Power, Light, Water.....	52,381.59
Maintenance, repairs	15,412.41
Taxes	38,185.73
Insurance	10,168.96
Salaries: Officers, Clerks.....	29,169.76
Uncollectible accounts, miscellaneous.....	6,378.47

Total Operating Expenses.....	476,577.23
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(Testimony of Peter Bercut.)

Administrative Expenses:

Soliciting, Automobiles	\$ 3,258.46
Miscellaneous Stationery, Telephone & Telegraph, Etc.	24,837.81

Total Administrative Expenses.....	28,096.27
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Total Expenses	504,673.50
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Profit From Operations Before Depreciation.....	342,147.56
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Other Income Credits:

Dividends	1,104.88
Miscellaneous credits	1,018.05

Total	2,122.93
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Gross Income Before Depreciation.....	344,270.49
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Other Income Charges:

Bond Interest	41,067.16
Other Interest	2,439.24
Amortization of bond discount and expense.....	4,150.34
Miscellaneous losses on accounts receivable and equipment, etc.	63,087.09

Total	110,743.83
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Net Profit Before Depreciation.....	233,526.66
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Provision for Depreciation.....	77,124.68
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Net Profit for Year.....	156,401.98
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[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22339.
 Filed 5-4-43. Walter B. Maling, Clerk. By J. P.
 Welsh, Deputy Clerk.

(Testimony of Peter Bercut.)

Mr. Scampini: Counsel has handed me a profit and loss statement as of December 31, 1940, wherein it is reported that the net income before depreciation was \$19,901.57, and after providing the sum of \$73,916.01 for depreciation the net loss was \$54,014.44. Is that, to your knowledge, a correct report of the earnings of the company for that year?

A. Yes.

Mr. Scampini: I will ask that be marked plaintiff's exhibit next in order.

(Profit and loss statement of December 31, 1940, marked "Plaintiff's Exhibit 30.")

PLAINTIFF'S EXHIBIT No. 30

Merchants Ice and Cold Storage Company

PROFIT AND LOSS STATEMENT

AS OF DECEMBER 31, 1940

Operating Revenues:

Storage	\$295,742.99
Ice	58,235.77
Power Sales	1,342.86
Rent, Miscellaneous	16,029.23

Total Operating Revenues.....	371,350.85
-------------------------------	------------

Operating Expenses:

Warehouse Labor	97,591.87
Engine Room Labor.....	13,091.23
Tank Room Labor, Ice Dept.....	8,208.27
Labor, Maintenance, repairs.....	12,799.41
Power, Light, Water.....	40,378.46
Maintenance, repairs	8,206.22
Taxes	22,828.65

(Testimony of Peter Bercut.)

Unemployment reserve, Payroll Taxes.....	\$ 4,583.93
Social Security Taxes.....	1,602.46
Compensation Insurance	2,863.27
Other Insurance	6,192.15
Salaries: Officers, Clerks.....	33,848.27
Cartage	124.63
Loss and Damage.....	6,580.46
Uncollectible Accounts	4,215.89
Rent	1,200.00
Power Sales Cost.....	1,379.39

Total Operating Expenses.....	265,694.56
-------------------------------	------------

Administrative Expenses:

Soliciting	3,249.35
Advertising	60.00
Automobiles	915.18
Officers, Expenses	2,791.90
Legal	2,644.80
Telephone and Telegraph.....	2,477.16
Postage	618.25
Stationery	2,180.77
Auditors	1,325.00
Miscellaneous Expenses	4,419.65
Loss and Damage.....	
Insurance	
Dues and Subscriptions.....	1,966.38
Administrative Expenses	3,542.16

Total Administrative Expenses.....	26,190.60
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Profit From Operation Before Depreciation.....	79,395.69
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Other Income Credits:

Dividends received	36.00
Salvage Sales	236.77

Total	272.77
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Gross Income Before Depreciation.....	79,668.46
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(Testimony of Peter Bercut.)

Income Charges:

Bond Interest	\$ 42,867.50
Other Interest	12,425.15
Amortization of reorganization expenses.....	4,348.14
Miscellaneous	150.00

Total	59,790.79
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Net Income Before Depreciation.....	19,901.57
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Provision for Depreciation.....	73,916.01
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Net Loss	54,014.44
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[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22339.
 Filed 5-4-43. Walter B. Maling, Clerk. By J. P.
 Welsh, Deputy Clerk.

Mr. Scampini: Q. I show you here, Mr. Bercut, what counsel has delivered to me, and purporting to be a balance sheet of the Merchants Ice & Cold Storage Company as of December 31, 1940, showing total assets, aggregate assets, of \$2,059,524.98, and against that first mortgage bonds outstanding aggregating \$659,500, and mortgage payable other property \$11,300; current liabilities of \$187,540.01; rent received in advance, \$2,048.47; and the balance reflected by capital stock outstanding, preferred 7% cumulative 41,615 shares carried at \$416,150, and common stock without par value 107,188 shares outstanding carried at \$999,575, or a total capital stock of \$1,415,725, and a deficit in the

(Testimony of Peter Bercut.)

surplus of \$216,588.50. Is that a correct balance sheet of the company as of that date?

A. Who was that prepared by?

Q. I don't know. A. By my office? [252]

Q. Yes, it was delivered to me by your office.

A. It is all right, then.

Mr. Scampini: I will ask that this be marked as plaintiff's exhibit next in order.

The Court: It may be admitted and marked.

(Balance sheet of December 31, 1940, marked "Plaintiff's Exhibit 31.")

PLAINTIFF'S EXHIBIT No. 31

Merchants Ice and Cold Storage Company

BALANCE SHEET AS OF DECEMBER 31, 1940

Assets		Month of December
Plant Property and Equipment:		
Land	\$ 865,608.55	
Buildings, machinery and equipment.....	2,284,365.54	
Less reserve for depreciation.....	1,336,625.18	
		<hr/>
		947,740.36
Plant property and equipment.....	1,813,348.91	<hr/> <hr/>
Acme Ice Cream Co.:		
Land and buildings.....	28,185.53	<hr/> <hr/>
Investments in Securities.....	26,437.40	

(Testimony of Peter Bercut.)

	Month of December
Current Assets:	
Cash	\$ 2,918.93
Notes receivable	13,604.15
Accounts receivable	134,219.78
	<hr/>
	150,742.86
Less reserve for doubtful accounts.....	26,500.00
	<hr/>
Total Current Assets.....	124,242.86
	<hr/> <hr/>
Due From Globe Brewing Co.....	27,995.68
Less reserve	15,000.00
	<hr/>
Total Due From Globe Brewing Co.....	12,995.68
	<hr/> <hr/>
Deferred Charges:	
Unamortized bond discount and expense.....	28,230.76
Commission on sale of Preferred stock.....	11,063.57
Prepaid taxes	11,443.60
Prepaid insurance	3,576.67
	<hr/>
Total Deferred Charges.....	54,314.60
	<hr/> <hr/>
Total	<hr/> <hr/> \$2,059,524.98

(Testimony of Peter Bercut.)

Liabilities		Month of December
First Mortgage 6½% Serial Gold Bonds.....	\$	659,500.00
Mortgage Payable Other Property.....		11,300.00
Current Liabilities:		
Notes payable, banks.....		98,199.58
Notes payable, other.....		5,771.89
Contracts payable		1,090.00
Accounts payable		30,462.24
Taxes payable, City and County.....		25,704.73
Accrued unemployment reserve for payroll taxes		4,271.54
Accrued Social Security taxes.....		656.74
Accrued Wages		3,958.34
Accrued bond interest.....		10,716.87
Accrued interest payable.....		2,331.99
Accrued Federal Income Taxes.....		1,912.50
Federal Income Tax assessment.....		1,713.59
Due on repurchase agreement for own Preferred Capital stock.....		750.00
Total Current Liabilities.....		187,540.01
Rent Received in Advance.....		2,048.47
Capital Stock:		
Preferred 7% Cumulative 41,615 shares outstanding		416,150.00
Common stock without par value, 107,180 shares outstanding		999,575.00
Total Capital Stock.....		1,415,725.00
Surplus as of March 31, 1941.....		216,588.50*
Total		\$2,059,524.98

*Indicates figures in red.

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22339.
 Filed 5-4-43. Walter B. Maling, Clerk. By J. P.
 Welsh, Deputy Clerk.

(Testimony of Peter Bercut.)

Mr. Scampini: Q. Now I show you what purports to be a balance sheet of December 31, 1941, and a comparison of it with the balance sheet of December 31, 1940, wherein the December 31, 1941, liabilities, current liabilities, have been decreased from \$187,540.01 to \$120,960.06, and the surplus deficit has been decreased from \$216,588.50 to \$212,093, the capital stock remaining the same at \$1,415,725 represented by the same number of shares that were outstanding on December 31, 1940. Is that a correct balance sheet for this year?

A. Yes.

Mr. Scampini: I ask that that be marked plaintiff's exhibit next in order.

The Court: It may be admitted and marked.

(Balance sheet of December 31, 1941 and comparison with balance sheet of December 31, 1940, marked "Plaintiff's Exhibit 32.")

PLAINTIFF'S EXHIBIT No. 32

Merchants Ice and Cold Storage Company

BALANCE SHEET AS OF DECEMBER 31, 1941 AND COMPARISON WITH DECEMBER 31, 1940

	Assets	Month of December 1940	Month of December 1941
Current Assets:			
Cash	\$	2,918.93	\$ 13,727.22
Notes receivable		13,604.15	
Accounts receivable		134,219.78	153,568.10
		150,742.86	167,295.32
Less reserve for doubtful accounts		26,500.00	26,500.00
Total Current Assets.....		124,242.86	140,795.32
Investments in Securities.....		26,437.40	26,437.40
Investments in Other Properties.....		41,181.21	38,479.07

(Testimony of Peter Bercut.)

	Month of December 1940	Month of December 1941
Plant Property and Equipment:		
Land	\$ 865,608.55	\$ 865,608.55
Buildings, machinery, equipment.....	2,284,365.54	2,303,426.83
Less reserve for depreciation.....	1,336,625.18	1,411,556.94
	<u>947,740.36</u>	<u>891,869.89</u>
Plant Property and Equipment	<u>1,813,348.91</u>	<u>1,757,478.44</u>
Deferred Charges:		
Unamortized bond discount and expense	28,230.76	23,882.62
Commission sale of Preferred stock	11,063.57	11,063.57
Taxes applicable to future period	11,443.60	10,098.93
Prepaid insurance	3,576.67	5,405.18
Total Deferred Charges.....	<u>54,314.60</u>	<u>50,450.30</u>
Total	<u>2,059,524.98</u>	<u>2,013,640.53</u>

Liabilities

Current Liabilities:

Notes payable, banks.....	\$ 98,199.58	\$ 85,000.00
Notes payable, other.....	5,771.89	
Contract payable	1,090.00	
Accounts payable	30,462.24	7,137.25
Taxes payable, City & County.....	25,704.73	10,098.93
Accrued unemployment payroll taxes	4,271.54	3,200.63
Accrued Social Security Taxes.....	656.74	558.07
Accrued Wages	3,958.34	3,126.80
Accrued bond interest.....	10,716.87	10,716.87
Accrued other interest.....	2,331.99	371.51
Accrued Federal-State Income Taxes	1,912.50	
Federal assessment	1,713.59	
Due on repurchase agreement for own Preferred Capital Stock.....	750.00	750.00
Total Current Liabilities.....	<u>187,540.01</u>	<u>120,960.06</u>

(Testimony of Peter Bercut.)

	Month of December 1940	Month of December 1941
Deferred Liabilities		\$ 3,000.00
Rent Received in Advance.....	\$ 2,048.47	1,448.47
Reserve for Contingencies.....		15,000.00
First Mortgage 6½% Serial		
Gold Bonds	659,500.00	659,500.00
Mortgage Payable Other Property...	11,300.00	10,100.00
Capital Stock:		
Preferred 7% cumulative 41,615		
shares outstanding	416,150.00	416,150.00
Common stock without par value		
107,180 shares outstanding.....	999,575.00	999,575.00
Total Capital Stock.....	<u>1,415,725.00</u>	<u>1,415,725.00</u>
Surplus as of December 31, 1941.....	216,588.50*	212,093.00*
Total	<u>2,059,524.98</u>	<u>2,013,640.53</u>

*Indicates figures in red.

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22339.
 Filed 5-4-43. Walter B. Maling, Clerk. By J. P.
 Welsh, Deputy Clerk.

Mr. Scampini: Q. I now show you a balance sheet of December 31, 1942, wherein the aggregate assets are valued at \$2,023,390.24, and current liabilities have been reduced to \$46,107.79; first mortgage bonds have been reduced to \$619,500, and the capital stock carried at \$1,415,725, evidenced by the same number of shares, and the surplus outstanding has been reduced to \$55,691.02. That is a

(Testimony of Peter Bercut.)

correct balance sheet for that year? A. Yes.

Q. Now, in 1943, beginning with January 1 to the present time, [253] is it not a fact that the operations of the Merchants Ice & Cold Storage Company show even greater profit than they show during the year 1942? A. Yes.

Mr. Scampini: I will ask that this balance sheet be marked plaintiff's exhibit next in order.

The Court: It may be admitted and marked.

(Balance sheet of December 31, 1942, marked "Plaintiff's Exhibit 33.")

PLAINTIFF'S EXHIBIT No. 33

Merchants Ice and Cold Storage Company

BALANCE SHEET AS OF DECEMBER 31, 1942

Assets

Current Assets:

Cash	\$ 16,840.28
Accounts receivable	190,455.28
Accrued interest receivable on Corporation Bonds	56.23

207,351.79

Less reserve for doubtful accounts..... 26,500.00

Total Current Assets..... 180,851.79

Investments 26,437.40

Investments in Other Property..... 28,185.53

Plant Property and Equipment:

Land	865,608.55
Buildings, Machinery and Equipment.....	2,364,915.39
Less reserve for depreciation.....	1,488,681.62

876,233.77

Plant Property and Equipment..... 1,741,842.32

(Testimony of Peter Bercut.)

Deferred Charges:

Unamortized bond discount and expense.....	\$ 19,732.28
Commission on sale of preferred stock.....	11,063.57
Prepaid insurance	4,777.12
Taxes applicable to future period.....	10,500.23
Total Deferred Charges.....	<u>46,073.20</u>
Total	<u>2,023,390.24</u>

Liabilities

Current Liabilities:

Accounts payable	\$ 17,314.44
Taxes payable, City and County.....	10,500.23
Accrued unemployment payroll taxes.....	4,980.83
Accrued Social Security Taxes.....	2,123.98
Accrued bond interest.....	10,066.80
Accrued other interest.....	371.51
Due on repurchase agreement on own Preferred capital stock.....	750.00
Total Current Liabilities.....	<u>46,107.79</u>
Rent Received in Advance.....	1,848.47
Reserve for Contingencies.....	15,000.00
First Mortgage 6½% Serial Bonds.....	619,500.00
Less Bonds in Treasury.....	28,000.00
	<u>591,500.00</u>
Mortgage Payable Other Property.....	8,900.00

Capital Stock:

Preferred 7% Cumulative 41,615 shares outstanding	416,150.00
Common stock without par value 107,180 shares outstanding.....	999,575.00
	<u>1,415,725.00</u>
Surplus as of December 31, 1942.....	55,691.02*
Total	<u>2,023,390.24</u>

*Indicates figures in red.

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22339R.
 Filed 5-4-43. Walter B. Maling, Clerk. By J. P.
 Welsh, Deputy Clerk.

(Testimony of Peter Bercut.)

Mr. Scampini: Q. What would you estimate the profit earned by this company for the first three months of 1943 was, about, if you know?

A. I don't know.

Q. Now I desire to point out to you, Mr. Bercut, that in arriving at the assets value of the plant and equipment of the company which was carried on the books in the balance sheet that ended on December 31, 1941, you carried plant property and equipment as follows—let us take 1940 first, December 31, 1940. Plant property and equipment, \$865,608.55; and on December 31, 1941, a year later, you still carried it at the same figure. Isn't it true that land down there is carried at cost on the books of the company?

A. I don't know.

Mr. Naus: Do you know that to be the fact?

Mr. Scampini: I am asking; I don't know.

Q. The land down there consists of approximately four square blocks on the Embarcadero, does it not? A. No.

Q. How much?

A. It is two blocks and part of another block. It was not that before we acquired it.

Q. You have acquired some property since?

A. Yes.

Q. It is the largest single piece of privately owned land in that district?

A. I don't know.

Q. It is all fed by spur tracks on the Embarcadero? [254]

A. Not all of it. We put in some more tracks.

(Testimony of Peter Bercut.)

Q. How many buildings are there there?

A. They go by numbers. We have there about three main buildings and other annexes.

Q. Smaller buildings?

A. Smaller buildings.

Q. Now, as of December 31, 1941 the buildings, machinery and equipment were valued—first, on December 31, 1940 they were valued at \$2,284,365.54, and as against which there had been reserved for depreciation the sum of \$1,336,625.18, bringing the net carried value of buildings, machinery and equipment to \$947,740.36. That is correct?

A. Yes, it must be correct.

Q. In 1941, a year later, the net carried value had been reduced after depreciation to \$891,869.89. That is right?

A. That is all bookkeeping. When you have the bookkeeper on the stand you can get that.

Q. But the reason I am asking this question is that every year there is a charge of about 70,000 to 75,000, and even up to 79,000, I think it is for 1942, charged as depreciation against the buildings, machinery and equipment.

A. I don't think that is enough. It depreciated much faster. Everything had to be repaired.

The Court: What is improper about that? What is the matter with that reduction?

Mr. Scampini: There is not anything. I am trying to find out how the net value was carried.

The Court: I want to follow the testimony.

(Testimony of Peter Bercut.)

Mr. Naus: I think, Mr. Scampini, that is the straight line method of depreciation on cost of many years ago.

Mr. Scampini: What I am driving at is the point that when it is carried at \$891,869.89, my opinion is that the reasonable value of these properties after writing off all depreciation [255] charges is not out of proportion to the carried value.

Mr. Naus: I thought you were asking for the fact.

Mr. Scampini: Q. In 1936 was there an appraisal of these properties made?

A. I don't know.

Q. In the reorganization proceeding?

A. I don't know.

Q. You have not come across it, have you?

A. My accountant did; I did not do it.

Q. Who is your accountant?

A. Mr. Evans.

Mr. Scampini: That will be all. Take the witness.

Cross Examination

Mr. Naus: Q. Mr. Bercut, I understood you to say that you fix approximately the time of your oral resignation to Mr. Arnold by reference to a loan of \$2,000 that you made to him?

A. Yes.

Q. Now, the purpose of that loan of \$2,000 was originally what?

A. Well, Mr. Arnold was worried by Mr. McInerney at that time.

(Testimony of Peter Bercut.)

Q. Mr. McInerney was pressing Mr. Arnold or the company for the payment of money?

A. For \$10,000.

Q. It was your suggestion, I believe you told Mr. Scampini, that you would be willing to be one of five men who loaned \$2,000 apiece and get rid of McInerney that way? A. Yes.

Q. After getting the \$2,000 from you did Mr. Arnold succeed in getting any money from anybody else to help him in that respect?

A. He told me that he had only been able to raise another \$3,000.

Q. Making \$5,000?

A. Making \$5,000. He did not succeed in getting the whole amount.

Q. So it was suggested that the \$2,000 arrangement be called off? A. Yes.

Q. Now, have you *with your* canceled check for the \$2,000 by which you can fix the date of the loan by you of that \$2,000? [256] Have you got that in your pocket? A. Yes.

Q. Will you produce it, please.

A. I have it here.

Mr. Naus: I only want this to fix the time, if your Honor please, not for anything else. Let me have the check.

I offer the check for the limited purpose I have stated, your Honor. The check is dated January 15, 1940, for \$2,000.

The Court: Very well; let it be admitted and marked.

(Check marked "Defendants' Exhibit A.")

(Testimony of Peter Bercut.)

DEFENDANTS' EXHIBIT A

11-1716

12

San Francisco, Cal., January 15, 1940

No.....

The Anglo California National Bank
of San Francisco
Market-Ellis Branch—Market, Ellis
and Stockton Streets

Pay to the Order of California Pacific Service, Ind.
\$2,000.00 The Sum of \$2000 and 00 Cts.....Dollars
(Personal Account)

PETER BERCUT

(On reverse)

Pay to the Order of
Pacific National Bank
California Pacific Service, Inc.
39 Paid Through 39
Clearing House

or

Pay to the Order of
Any Bank, Banker or Trust Co.
Prior Endorsements Guaranteed

Jan 17, 1940

Pacific National Bank
of San Francisco

11-39

11-39

[Endorsed]: Defts. Ex. No. A. Filed 5-4-43.
Walter B. Maling, Clerk. By J. P. Welsh, Deputy
Clerk.

(Testimony of Peter Bercut.)

Mr. Naus: Q. I understood you to say to Mr. Scampini that Mr. Arnold paid that \$2,000 back in two installments of \$1,000 each. A. Yes.

Q. These other papers you have handed to me help you to fix the time of these payments back, do they? A. Yes, they do.

Mr. Naus: I might say, if your Honor please, that one is a bank statement showing a deposit of \$1,000, and the other is a deposit slip.

Q. By the way, Mr. Bercut, that \$2,000 you loaned Mr. Arnold did not come from any of your companies; it came from your personal funds, your personal bank account?

A. My personal bank account, yes.

Q. Now, I first hand you a monthly bank statement from the Anglo California Bank under the name of Peter Bercut. Was that your personal checking account? A. Yes.

Q. Can you tell from a deposit slip of \$1,000 in that account the month when it was that Mr. Arnold paid back to you the first \$1,000 on the loan of \$2,000? A. That would be December 1939.

Q. That is the beginning of the account. That is the old balance of December 31, and along here are dates through January. I notice here is a deposit of \$1,000 on January 31, 1940.

A. That is the check. [257]

Q. Is that the first \$1,000 he paid back to you?

A. The first payment on the \$2,000.

Mr. Naus: I will ask that that account be marked Defendants' Exhibit B for identification.

(The bank statement was marked "Defendants' Exhibit B for Identification.")

(Testimony of Peter Bercut.)

DEFENDANTS' EXHIBIT B

STATEMENT							
In Account with							
The Anglo California National Bank							
PETER BERCUT,							
743 Market St., San Francisco, Calif.							
Checks							
Listed in Order of Payment—Read Across		Date	Deposits	Date	New Balance		
Balance Brought Forward							
24.67—				Dec 30	39	2,382.24	*
22.76—				Jan 2	40	2,357.57	*
42.14—				Jan 4	40	2,334.81	*
25.00—				Jan 6	40	2,292.67	*
400.00—			118.40	Jan 8	40	2,376.46	*
124.64—				Jan 9	40	1,976.46	*
				Jan 10	40	1,851.82	*
			85.00	Jan 11	40	1,936.82	*
			100.00	Jan 15	40	2,031.82	*
5.00—				Jan 17	40	31.82	*
2,000.00—				Jan 18	40	11.98—	0
43.60—			100.00	Jan 22	40	88.02	*
			100.00	Jan 29	40	188.02	*
			1,000.00†	Jan 31	40	1,188.02	*

†Circled and indicated in red pencil: "Pac. Empire deposit"

(Testimony of Peter Bercut.)

Important: Please Examine at Once. All errors or exceptions (including irregularities of endorsements, or of signatures) must be reported within 30 days, otherwise this bank will assume the above account to be correct.

In receiving items for deposit or collection, this bank acts only as depositor's collecting agent, and the rights and obligations of the parties are governed and controlled by the provisions of Sec. 16c of the Bank Act of the State of California.

We urge you to carefully protect your statements and cancelled checks as dishonest persons may steal them for fraudulent purposes.

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22339R.
Defts. Ex. No. B for Identification. Filed.....
Walter B. Maling, Clerk.

Mr. Naus: Q. I hand you another slip, which is the carbon that you keep or your secretary made for you of a deposit that you made as of the date indicated; is that correct? A. Yes.

Q. State whether or not the \$1,000 appearing thereon as being deposited in your personal account was the second \$1,000 that Mr. Arnold paid back to you. A. Yes, 11/17/—

Q. Up in here, is that not the deposit made, May 6, 1940? A. Yes.

Mr. Naus: I will ask that this be marked for identification.

(The deposit slip was marked "Defendants' Exhibit C for Identification.")

(Testimony of Peter Bercut.)

DEFENDANTS' EXHIBIT C

THE CHATEAU

PETER BER CUT

May 6, 40

May 6, 40

11-39

1000

11-17-16

100

Pacific Empire Holdings

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No.
 22339R. Defts. Ex. No. C Ident. Filed
 Walter B. Maling, Clerk.

Mr. Naus: Q. So, was it on May 6, 1940, that you deposited Mr. Arnold's check for the second \$1,000 that he paid back to you? A. Yes.

Q. I understood you to say to Mr. Scampini this morning that on the second \$1,000 Mr. Arnold gave you what you called a postponed check; you mean a postdated check? A. Yes, postdated.

Q. Now, this postponed or postdated check that you deposited on May 6, 1940, you deposited it as soon as the date came that was written on the check, didn't you?

A. Yes, I was expected to hold it until that date.

Q. About how long in the future was the check dated or postdated when Mr. Arnold gave it to you?

A. Oh, I think about [258] two weeks.

Q. It was postdated about two weeks?

A. Yes.

(Testimony of Peter Bercut.)

Q. Well, then, is it not the fact that he actually handed you this check approximately two weeks before May 6, 1940, the date you deposited it?

A. Yes.

Q. Do you fix the time of your statement or oral resignation to Mr. Arnold as the time when he finally gave you the postdated check?

A. Yes, because I had quite some trouble getting it from him.

Q. Tell the Court something about the difficulty you had in getting that second check from Mr. Arnold, after he had given you the first check.

A. I had to go several times, and most of the time they would tell me Arnold was not there, and finally I saw him, I caught him there, and he had to give me the check.

Q. He gave you the postdated check?

A. He told me it had to be postdated.

Q. That would be roughly two weeks before May 6, 1940, when he finally gave you a postdated check that you told him that you were through with these two companies? A. Yes.

Q. Now, in one of the exhibits put in by Mr. Scampini for the plaintiff there is a reference to the resignation being backdated to March 31, 1940. In putting that back date on your resignation was that date selected by you or was it selected by Mr. Arnold?

A. It was selected by Arnold. I did not even know what date it was when he gave it to me.

(Testimony of Peter Bercut.)

Q. Have you any idea why Mr. Arnold selected the date of March 31, 1940, any more than he might have selected any other date?

A. The only thing I can think of, he had to get close to the date that I resigned. [258-A]

Q. In connection with this matter of the physical condition of the buildings, when you took the management over, describe to the Court the physical condition of the property itself, the ammonia process and refrigerating equipment. Had it been kept up?

A. It had been running down for years. It would be a very difficult thing to describe. It was practically all run down—the insulation falling down from all the pipes.

Q. The insulation fell away from the pipes?

A. Yes, and we have not had the time to fix it all up yet. There is plenty to do. And the ceilings of the refrigerator rooms leaked and got wet and fell down.

Q. If the Judge cares to, you could take him down and show him the condition yet?

A. I would be very happy to do that. We have been straightening up the roof for six months, fixing the roof, because every place is covered with leaks and the water running into the merchandise.

Q. Now, in the year 1941 you had had the management of the company for about ten months; that is, after the first two months of the year you ran it the last ten months?

A. Yes.

(Testimony of Peter Bercut.)

Q. According to this profit and loss statement you made a net operating profit of about \$4,000 for that year. A. Yes.

Q. During that year did you or your brother, or both of you, give personal guarantees to the bank up to \$100,000 on the finances? A. Yes.

Q. And by giving your personal guarantee did you get the interest rate cut down at the bank?

A. They were paying eight per cent, and when I called that to the attention of the bank, that eight per cent on the loan, they said that their credit was bad, and I said, "If I guarantee the notes, will that make a difference?" and they said it would be four per cent, and in order to get the [259] four per cent I guaranteed the notes.

Q. Take the year 1942, the statement here shows that in that year there was an operating profit for the year of \$156,401.98. By the way, that was before the Federal taxes, was it not—that was before the payment of Federal corporation income taxes?

A. Yes, before the Federal.

Q. After the payment of the Federal corporation income taxes on that \$156,000 did you not take what was left and use it in order to pay and retire amounts of the principal on the bond issue, or else put it back into the buildings in an effort to rebuild the property? A. That was it.

Q. Since you have taken over the management have either you or your brother taken out a penny by way of salary or compensation or dividends or profit of any kind?

(Testimony of Peter Bercut.)

A. No, I didn't think that they could afford it.

Q. And you always put it back and still are trying to rebuild the property? A. Yes.

Q. And is there still a good deal of that to be done to put it in proper shape?

A. I am spending all of my time working on it.

Redirect Examination

Mr. Scampini: Q. These notes that you guaranteed at the bank, which bank was it?

A. The Pacific National Bank.

Q. Where you are a director? A. Yes.

Q. You became a director of that bank through Pacific Empire Holdings and the Pacific Empire Corporation, didn't you? A. Yes.

Q. You never suffered any loss or incurred any damage as a result of your guaranteeing the notes for the Merchants Ice & Cold Storage Company, did you? A. No. [260]

Q. The company paid for its own obligations without any damage to you or any reason for you to make good on your guarantee, didn't it?

A. I just thought it was for the benefit of the company to do that.

Q. And of course, you felt it was for the benefit of yourself as the owner of more than half of the outstanding stock, didn't you?

A. Oh, yes, I figured for myself, too.

Q. You didn't think of guaranteeing the notes of the company or improving its credit prior to your acquisition of the block of stock; you thought of it after that?

(Testimony of Peter Bercut.)

A. But I never did it any damage either.

Q. I will ask you again, You never offered to guarantee the note of the Holding Company prior to your acquisition of this block of stock?

A. I was not asked to do that.

The Court: I might say there was no obligation for him to do so.

Mr. Scampini: I grant your Honor is correct, except to say the acquiring of the stock is not a benefit to the company, it is a personal benefit.

The Court: He answered it by saying he has something to work for.

Mr. Naus: He has some control of it.

Mr. Scampini: Q. In 1941 you reported a profit of \$4,495, but you had a lot of expenses for repairs and damage that you found in the plant, didn't you?

A. Yes.

Q. You charged all of those expenses to depreciation?

A. The expense of repairs was very heavy and the expenses are all accounted for.

Q. Who owns or who has possession of this block of stock acquired from the Pacific Empire Holdings from Mr. Maffei and [261] Mr. Arnold?

A. Henri Bercut and Peter Bercut.

Q. Henri Bercut and Peter Bercut?

A. Yes.

Q. What proportion of the stock does Henri Bercut own? A. Half.

(Testimony of Peter Bercut.)

Q. You negotiated the deal with Mr. Arnold and Henri was a partner with you, is that right?

A. Yes, my brother and I have been in partnership in other ventures.

Q. He had nothing to do with negotiating the deal?

A. In fact, he didn't want any part of it at first, and I had to do a lot of talking to get him interested with me.

Q. You conducted the negotiations yourself with Mr. Arnold? A. Yes.

Q. You signed the contract yourself with Mr. Arnold, Henri Bercut never signed? A. No.

Q. Did your other brother or sister have any interest in the stock? A. No.

Q. Just you and your brother Henri?

A. Yes.

Mr. Scampini: At this time I move to dismiss as to the defendant Jean Bercut—that is your sister?

The Witness: No, that is Jean (pronouncing "John").

Mr. Scampini: Q. Your brother?

A. Yes.

Mr. Scampini: Ernest Bercut, Mary Doe Bercut, May Jane Bercut.

Q. Ernest Bercut—is he your brother?

A. He is my nephew.

Q. He has no interest in this stock?

A. No.

(Testimony of Peter Bercut.)

Q. Just you and your brother Henri?

A. Yes.

Q. Where are the shares now?

A. In our possession.

Q. In your possession? A. Yes.

Mr. Naus: The defendants you have dismissed are Jean Bercut, Ernest E. Bercut, Mary Doe Bercut, and Mary Jane Bercut. There still remains the case against the fictitious defendants. [262]

Mr. Scampini: I have already dismissed against the fictitious defendants.

Mr. Naus: So there remain only Henri Bercut and Peter Bercut and Maffei and Arnold?

Mr. Scampini: That is right. That will be all.

Mr. Pardini: Along the line of examination that was opened up, just a question:

Q. Have you any arrangement or agreement whereby L. R. Arnold or M. Maffei have any interest in any of these shares of stock?

A. No.

Q. Have they any right, title or interest in any part of the shares of stock which are in issue?

A. No.

Q. Have they ever had after January 8, 1940, any interest in connection with the corporation other than before they were out there as officers?

A. No, they never came back to the plant or anything.

Q. And they had no interest in the shares of stock other than that small block of stock that you said you purchased from Mr. Maffei?

(Testimony of Peter Bercut.)

A. No. The option to buy the 20,000 shares was to the company.

Q. You had no arrangement with Mr. Maffei or there has never been one in existence; is that right?

A. That is right.

Q. Mr. Arnold and Mr. Maffei have no interest in the shares of stock which you have testified are now in the name of yourself and your brother Henri?

A. No.

Mr. Pardini: That is all.

Mr. Naus: Q. Mr. Bercut, as a matter of fact, in buying this stock, the stock you and your brother Henri bought, you bought strictly on your own account, and you had no arrangement with Mr. Arnold and Mr. Maffei, and you have no such [263] arrangement now in the world; is that correct?

A. That is correct.

Q. As a matter of fact, immediately after buying the stock you fired Mr. Arnold so far as any connection with the company is concerned? You did not want to have him have anything to do with it?

A. No.

Q. Mr. Maffei had nothing to do with the management since the time you went in?

A. No.

Q. You fired Mr. Morris because you thought \$250 a month was \$250 a month more than he was worth to the company, because he was not doing anything?

A. Yes, and the company could not afford it either.

(Testimony of Peter Bercut.)

Mr. Scampini: Q. I forgot to ask you: On or about September 9, 1942, did you receive the original of this letter from me asking for return of stock? A. Yes.

Q. You will admit, of course, that that was never returned or offered to be returned, is that right?

A. Yes.

Mr. Scampini: I offer in evidence a demand and ask that it be marked plaintiff's exhibit next in order.

Mr. Naus: Just to prove the demand, not to prove the fact.

(The letter was marked "Plaintiff's Exhibit 34.")

PLAINTIFF'S EXHIBIT 34

HETTMAN & SCAMPINI

Counselors at Law

Bank of America Bldg.

485 California St.

San Francisco

A. J. Scampini

Walter E. Hettman

September 9, 1942

Mr. Peter Bercut,

Merchants Ice & Cold Storage Co.,

Battery & Lombard Sts.,

San Francisco, California.

Dear Sir:

Please be advised that Thomas H. Wingate, by an order of the Chancery Court of the State of

(Testimony of Peter Bercut.)

Delaware, County of Newcastle, in which county Pacific Empire Holdings, Incorporated, was and is incorporated, has been appointed receiver in equity for Pacific Empire Holdings, Incorporated, with full power and authority to take possession of all of its business affairs, books, records and properties and vested with title to all of the property, real and personal wheresoever situated and of whatever kind or character, other than real estate located outside of the State of Delaware.

Reference is hereby made to that Letter Agreement dated January 8, 1941, purportedly entered into between yourself, in an individual capacity, and Pacific Empire Holdings, Incorporated, of which you were then and there director, vice president and a member of the executive committee, wherein and whereby you purportedly purchased 78,358 shares of the capital stock of Merchants Ice & Cold Storage Company from Pacific Empire Holdings, Incorporated, for the alleged consideration of \$35,000.

You are hereby advised that said Thomas H. Wingate as such receiver hereby repudiates the said transaction and demand is hereby made upon you and all those acting through you in the premises to deliver possession of said shares of stock forthwith to A. J. Scampini, Esq., who has been designated agent and attorney in California for said receiver, in failure of which proper proceedings will be

(Testimony of Peter Bercut.)

brought against you and all persons acting with and through you in said transaction.

Yours very truly,

A. J. SCAMPINI

Attorney for Thomas H. Wingate,
Receiver in Equity for Pacific
Empire Holdings, Incorporated.

AJS:hw

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22339R. Plfs. Ex. No. 34. Filed 5-4-43. Walter B. Maling, Clerk. By J. P. Welsh.

Mr. Scampini: Mr. Brownstone made the statement to the Court in his opening statement that no tender was made of \$35,000, and I ask Mr. Brownstone to stipulate that on or about March 24, 1943, he received the original of this letter from me, and ask him to stipulate that he never replied.

The Court: We will take a short recess and counsel may examine the document.

(After recess:)

Mr. Brownstone: Since we are going to discuss the letters [264] which have passed between counsel before trial, I will make this answer to your question: On March 23, 1943, I had a conversation with you with respect to the matter of time for filing claims against the receiver as the representative of the Merchants Ice & Cold Storage Company, and

(Testimony of Peter Bercut.)

at that time you suggested the possibility of settlement of the case to me and said that you would be willing to pay \$35,000 and more, and that you had the cash on hand.

On March 24, 1943, you forwarded me a letter, a copy of which I show you, in which you made a number of statements to which I did not reply in writing, but a few days subsequent to March 24,—and I can check the date from my notes—we had a further conversation in which I advised you that the statements that you made in the letter were not true, and you further made the statement with respect to the tender that you had \$35,000 in the bank downstairs, and at the opening of the trial you would tender \$35,000 to us in open court. With that statement, and with the statement, your Honor, that these letters are entirely immaterial, we are perfectly willing to let your Honor read them.

Mr. Pardini: As to this matter, I will say, representing Mr. Arnold and Mr. Maffei, that no foundation has been laid for the introduction of such evidence; it is immaterial, irrelevant and incompetent and hearsay, and I will reserve a motion to strike out the testimony at the proper time.

The Court: The record may so show.

Mr. Scampini: I will ask that the letter be received in evidence, then, for whatever it may be worth.

(The letter was marked “Plaintiff’s Exhibit 35.”)

(Testimony of Peter Bercut.)

PLAINTIFF'S EXHIBIT No. 35

March 24, 1943.

Mr. Louis H. Brownstone,
Attorney at Law,
Russ Building,
San Francisco, Cal.

Dear Mr. Brownstone:

Re: Wingate vs. Bercut

This will confirm our understanding with respect to the above matter as expressed in your letter to me of March 23, 1943.

I told you over the 'phone yesterday that up to the present time I have pursued a policy, in connection with the litigation pending against the Bercuts, of hiding from you none of the facts upon which we rely in support of our claim. I have no doubt you will admit that we have made available to you every scrap of evidence that we possess. The reason I have done this is so there can possibly be no dispute about the facts of the case.

It is true that Mr. Bercut takes the position that he ceased being a director of the holding company sometime in 1940, but between us as two lawyers I have no doubt at all that the contention is not made very seriously—the facts are against said contention.

The situation therefore resolves itself into purely a legal proposition, and when it comes to that phase

(Testimony of Peter Bercut.)

of the case the law is in the books, and I told you that I would submit to you the authorities upon which I intend to rely in support of our claim. Consequently, herewith is a memorandum in both cases. I think, after you have studied over the theory of our case and the authorities cited in this memorandum you will come around to seeing our point of view—namely: that Mr. Bercut should return that stock to the company from whence it came. I assure you that the Receiver, subject to the approval of the court, is ready and willing to make such adjustments toward Mr. Bercut as might be reasonable in view of the circumstances.

In view of the fact that I have now delivered to you even the law upon which I intend to rely I think, if you decide to go to trial, you should serve upon me the authorities upon which you intend to rely so that we may be prepared in open court to argue each others case.

Kind personal regards.

Yours very truly,

A. J. SCAMPINI

AJS:hw

(Testimony of Peter Bercut.)

March 23, 1943

Mr. A. J. Scampini,
Attorney at Law,
300 Montgomery Street,
San Francisco, California.

In re: Tanzer v. Pacific Empire Holdings, Inc.—
Court of Chancery—State of Delaware, in
and for New Castle County

Dear Mr. Scampini:

Confirming our conversation of today respecting the filing of claims by creditors in the above named receivership proceeding, you have advised me that the time within which claims may be filed in the receivership proceeding has not as yet begun to run. You have further advised me that arrangements are being made so that the claims of California creditors may be filed locally and that creditors will be given notice of the time within which, and the place at which to file such claims.

It is further our understanding that you will advise me of such time and place when the same has been fixed, so that I may take such action as I deem necessary and proper to protect the rights of California claimants represented by me.

Very truly yours,

LOUIS H. BROWNSTONE

LHB/NP

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22339R. Plfs. Ex. No. 35. Filed 5-4-43. Walter B. Maling, Clerk. By J. P. Welsh, Deputy.

(Testimony of Peter Bercut.)

Mr. Scampini: There is that Exhibit 26, which is a [265] letter of resignation by Mr. Bercut, which was only offered for the purpose of identification so far, and I will ask that it be now introduced in evidence as plaintiff's exhibit next in order.

The Court: It may be admitted and marked.

(Plaintiff's Exhibit 26 for Identification was received in evidence.)

PLAINTIFF'S EXHIBIT No. 26

March 31, 1940

Pacific Empire Holdings, Inc.
26 O'Farrell Street
San Francisco, California

Gentlemen:

Because of the pressure of other business, I will be unable to devote sufficient time to the company to be of real value.

Consequently, please consider this letter my resignation as an Officer and Director of Pacific Empire Holdings, Inc.

Yours very truly,

PETER BERCUT

PB/lk

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22339R.
Pltfs Ex. No. 26. Filed 5-4-43. Walter B. Maling,
Clerk. By J. P. Welsh, Deputy Clerk.

(Testimony of Peter Bercut.)

Mr. Naus: Just one question, Mr. Bercut:

Q. Mr. Scampini showed you what the clerk has marked Plaintiff's Exhibit 34, a letter from Mr. Scampini addressed to you as of September 9, 1942. Up to the time that letter was received by you, about twenty months after the deal, had anyone ever said to you either orally or in writing that there was anything wrong with the deal?

A. No, not a word.

Q. During the entire period of twenty months, then, from the time the deal was made until Mr. Scampini wrote you that letter, you had no intimation either orally or in writing that there was anything wrong with the deal?

A. No, not a word.

Q. You paid \$35,000 at the time of the deal?

A. Yes.

Q. And at the time of the deal you did not get all of the stock, all of the stock that was coming to you, did you?

A. No.

Q. There was some 5,000 or 5,500 that you got a little later?

A. Yes.

Q. And there was delay in the delivery of them because somebody was holding them in pledge?

A. Yes.

Q. Didn't you and your brother have to pay \$3,950 to get that stock out of pledge?

A. My brother loaned the money to get the stock out of pledge; I did not do it.

Q. Some two or three months after January 8, 1941 your brother turned over \$3,950 to Mr. Arnold

(Testimony of Peter Bercut.)

or to Pacific Empire Holdings [266] by way of a loan? A. Yes.

Q. In order that Pacific Empire Holdings—sometime, I think it was, in April '41, wasn't it?

A. Yes.

Q. So that sometime in April 1941 Pacific Empire Holdings could redeem some of the shares and deliver them to you? A. Yes.

Q. Has that \$3,950 ever been paid back to you?

A. Only one payment on the note, which I think was \$100 a month.

Q. \$100 was paid?

A. They only paid \$100.

Q. Now, that took place, did it not, some two or three months after you actually signed and handed over to Mr. Arnold the paper of resignation as a director? A. Yes.

The Court: Step down.

Mr. Scampini: I now ask permission to read into the record the deposition of Miss Leona Keener that has been taken, your Honor.

(Thereupon the deposition of Leona Keener was read.)*

Mr. Scampini: I wish now to read the deposition of L. R. Arnold.

(Thereupon counsel read the deposition of L. R. Arnold to line 3, page 32.)

The Court: We will take an adjournment now until tomorrow morning at ten o'clock.

(Thereupon an adjournment was taken until Wednesday, May 5, 1943, at 10:00 a. m.) [267]

*[Printer's Note]: Set forth herein at page 675.

Wednesday, May 5, 1943—10:00 A. M.

Mr. Scampini: We will continue with the reading of the deposition of Mr. Arnold.

(Thereupon counsel continued with the reading of the deposition to line 18, page 152.)

The Court: We will take a recess now until two o'clock.

(Thereupon a recess was taken until 2:00 p. m. this date.)

Afternoon Session—2:00 P. M.

Mr. Scampini: If your Honor please, counsel asked me this morning to produce these documents or correspondence or what not that transpired between Delaware counsel and what not, and I don't know whether counsel wanted them in evidence.

The Court: Let them inspect it, and let us proceed.

Mr. Scampini: Might I have permission of the Court to call out of order one of our expert witnesses, Mr. Haynes, who happens to be here at two o'clock?

The Court: Very well.

A. W. HAYNES

called for plaintiff; sworn.

Direct Examination

Mr. Scampini: Q. Mr. Haynes, you are a member of the firm of Haskins & Sells? A. Yes.

Q. And Haskins & Sells are certified public accountants? A. Yes.

Q. You are a partner in that firm?

A. Yes.

Q. You, of course, are a certified public accountant also? [270] A. I am.

Q. How long have you been practicing your profession? A. Twenty years.

Mr. Scampini: Will you stipulate to his qualifications?

Mr. Naus: I don't know anything about the gentleman. I assume he is qualified and has had experience.

Mr. Scampini: Q. Haskins & Sells were for some years auditors of Merchants Ice & Cold Storage Company? A. Some years.

Q. What years, do you recall?

A. I recall only the years 1936, 1937 and 1938.

Q. And terminated as auditors as far as that firm was concerned with the year ending December 31, 1938, is that right? A. That is right.

Q. Do you know whether or not John F. Forbes succeeded you as auditors down there for the following year?

A. He did the following year; beyond that I have no knowledge.

(Testimony of A. W. Haynes.)

Q. Have you got with you the audit and work papers upon which the audit was made of Merchants Ice & Cold Storage Company for the year up to and ending December 31, 1938?

A. I have the audit report and certain of the work papers with me.

Q. Have you also got the audit report for 1937?

A. Yes.

Q. Now, looking at your audit report, Mr. Haynes, will you state to the Court the aggregate assets of the company for the year ending December 31, 1938.

A. The aggregate assets——

Mr. Naus: One moment. That is calling for an answer as to facts, and probably much of his information is based on hearsay from the books and what was told him.

Mr. Scampini: Q. As shown by the books of the company which you audited.

A. The total assets as shown by the [271] books and as set forth in our report amounted to \$2,153,809.33.

Q. How much was the aggregate current and fixed liabilities and other charges other than equity behind the stock for the year ending December 31, 1938?

A. Total liabilities other than capital stock and surplus account amounted to \$882,894.63.

Q. How much was the net worth of the company for the year ending December 31, 1938?

A. The net worth on that basis was \$1,270,914.70.

(Testimony of A. W. Haynes.)

Q. The net worth of the company was represented by how many shares and of what class, Mr. Haynes?

A. As of December 31, 1938 there were outstanding 41,615 shares of preferred stock and 107,-180 shares of common stock.

Q. And the par value of the preferred stock was how much?

A. The par value of the preferred stock was \$10 a share.

Q. Can you state whether or not that preferred stock carried—what dividend rate it carried and whether or not it was cumulative?

A. The preferred stock carried a cumulative seven per cent rate.

Q. How much had the firm accumulated as cumulative dividends on preferred stock up to December 31, 1938, approximately? A. \$340,000.

Q. Now, the net worth of the company evidenced by the preferred stock and common stock, what value did you give the outstanding preferred stock?

A. The figure before mentioned as net worth of the company, as expressed at \$1,270,000-odd would be reduced by the \$340,000, and applying that to the preferred stock would arrive at the common equity.

Q. In other words, in arriving at the amount of net worth attributable to the outstanding preferred stock you would have [272] to attribute to it not

(Testimony of A. W. Haynes.)

only its par value but also the cumulative dividends unpaid; is that right? A. Yes.

Q. How much would that be per share, that is, par value plus cumulative dividends?

A. Approximately \$18.17 per share.

Q. Per share on outstanding preferred stock, is that right? A. Yes.

Q. And the net worth of the company was sufficient to attribute or to allocate—what would probably be a better term—the sum of \$18.17 to outstanding preferred stock and some equity in common stock? A. Yes.

Q. How much would the equity be which would be allocated to common stock?

A. That would leave for that common stock \$514,764.70.

Q. How much would that be per share?

A. \$4.80.

Q. Now, in arriving at the net worth of the company upon what were the values of land, buildings and equipment arrived at, that is, what was the formula used?

A. The value of the land and what we generally term the fixed assets was based on an appraisal made by the American Appraisal Company in 1927. To that had been added subsequent additions and there had been deducted retirements up to December 31, 1938.

Q. That is the land?

A. That includes the land, buildings, machinery, equipment, fixtures, and other terms of property.

(Testimony of A. W. Haynes.)

Q. Now, what formula was used in determining the depreciation on all of these buildings and equipment?

A. At the time the American Appraisal Company made its appraisal in 1927 it recognized what is termed a composite rate of $3\frac{1}{4}$ per cent, and the company followed that rate of depreciation throughout the period with which I am familiar at least.

Q. Let us take 1938. Was the amount of depreciation [273] allocated the concern for that year based upon that formula?

A. For 1938 the provision for depreciation amounted to \$73,614.24.

Q. In 1937 how much was the provision for depreciation?

A. It was something less—\$600 or \$700 less. I can give you the exact figures for 1937; the provision for depreciation was \$72,486.71.

Q. Now, in arriving at the net worth of the company as of December 31, 1938 how much depreciation had been taken on the buildings, machinery and equipment up to that time?

A. In the aggregate the reserve for depreciation as of December 31, 1938 amounted to \$1,185,957.71.

Q. Leaving a net value, in other words, for buildings, machinery and equipment on December 31, 1938 of what figure?

A. Exclusive of land?

Q. Exclusive of land. A. \$1,083,094.70.

Q. Now, the land was carried at what figure?

(Testimony of A. W. Haynes.)

A. \$890,608.55.

Q. And that value is the appraised value of the property or land made by the American Appraisal Company in 1927; is that right, plus any additional cost, less any retirements?

A. At either cost or appraised value of the property.

Q. What is the par value of the common stock outstanding?

A. The common stock is stock without par value and carried at a stated value.

Q. What is the stated value?

A. \$999,575.

Q. Did the company have a deficit in its surplus account on December 31, 1938?

A. Its operating surplus?

Q. I do not know anything about accounting.

A. The composition of the surplus account was a net deficit. It consisted of various items. There was a surplus from depreciation of the land value of \$148,700-odd. [274]

The Court: Q. What do you mean by that?

A. The American Appraisal Company placed a value on the land at the time of \$148,000 in excess of what it cost the company. It wrote this land up to that appraised value. There was also surplus which arose from acquisition of preferred capital stock at less than par value of some \$79,000 and subsequent acquisition of common stock at less than the stated value of approximately \$4,500. These

(Testimony of A. W. Haynes.)

amounts total slightly less than \$233,000 and there is offset against the profit and loss deficit from operations \$377,000-odd, leaving a net deficit or impairment of capital of \$144,800-odd.

Q. What was the value of the common stock that they bought?

A. They paid something like \$4,000 less for the common stock than the stated value per share.

Mr. Scampini: Q. Now, in arriving at the net worth, I take it that that deficit had already been deducted; is that right?

A. Well, yes, that had been deducted.

Q. In the course of your audit of the company's affairs for the year 1938 did you verify the current assets and accounts receivable and other items constituting the current assets? A. Yes.

Q. Were proper reserves set up by you, or reserves deemed by you proper, between the accounts doubtful or uncollectible accounts receivable?

A. They were deemed to be adequate.

Q. The net worth figures to which you testified are the result after the allocation of proper reserves against those doubtful or other uncollectible items, is that correct? A. Yes.

Mr. Scampini: That is all.

Cross Examination

Mr. Naus: Q. Mr. Haynes, Haskins & Sells did the annual [275] auditing for what years?

A. 1936, 1937 and 1938 that I know of, and some years behind probably, but I could not state.

(Testimony of A. W. Haynes.)

Q. You mean earlier than that? A. Yes.

Q. You know as to those three calendar years 1936, 1937 and 1938 because you have the papers before you? A. I have the reports before me.

Q. You have the reports and some work sheets as well? A. Some work sheets on 1938 only.

Q. You have no information immediately at hand with respect to any earlier years? A. No.

Q. Is that clear? A. That is clear.

Q. Now, this audit was not merely addressed to the balance but to the operations of each of those three years, was it not? A. Yes.

Q. You audited the net result of the operations of the Merchants Ice & Cold Storage Company for each of those three years? A. Right.

Q. Is it the fact that the net result of the operation of the company for each of these years was a loss in each of those three years?

A. There was a loss in each of the three years.

Q. Did you or not from your audit determine that for the calendar year 1936 the operations of the company for that year resulted in a loss of \$75,112.69? A. I have got \$75,114.69.

Q. I probably read the figure 4 as 2. We are within \$2 of each other. A. Yes.

Q. The loss was something over \$75,000 in operations for that year? A. Yes.

Q. Now, in the year 1937 did you find from your audit that the——

A. I take exception to the statement you made

(Testimony of A. W. Haynes.)

that the loss from operations was \$75,000. We make a distinction [276] between unusual charges and ordinary operating charges. \$75,000 was the net deficit in the deficit account for the year, but there was something over \$8,000 of extraordinary charges, the major portion of which applied to prior years.

Q. I will put it to you this way, the simplest possible way: What did the Merchants Ice & Cold Storage Company lose in the calendar year 1936 by virtue of running the business?

A. 1936 we would say the net loss from operations was something slightly over \$67,000.

Q. Now, in the year 1937 was there a net loss of something over \$8,000?

A. Slightly over \$8,000.

Q. And for the calendar year 1938 did the Merchants Ice & Cold Storage Company run at a loss of over \$128,000?

A. We would say the loss for the year was something over \$51,000 and there were \$70,000 of unusual charges which would apply to the earlier years.

Q. What were they?

A. From what I have here I can make no allocation as to appropriate years. There were liabilities of \$26,000 of uncollectible accounts applicable to prior years and a write-down of the investment in Acme Ice Cream Company for \$35,800, approximately, and a provision for contingencies of \$15,000,

(Testimony of A. W. Haynes.)

which I do happen to know was directed mainly to the account of the Globe Brewing Company.

Q. Well, disregarding these items that you say were the non-operating items, is it or not a fair rough general statement from me that for the three years that your audit embraced, that for that three years the Merchants Ice & Cold Storage Company lost in excess of \$100,000 or virtually that for running the business? A. I should say yes.

Q. It lost close to \$125,000 in running the business, didn't it, [277] in the aggregate in those three years? A. Close to \$125,000.

Q. Now, on this net worth that you spoke of, you gave a figure of \$2,100,000, or, rather, the total amount of the assets.

A. That was the total amount of assets.

Q. Did you include in your statement of those assets the paper value of \$25,000 as an asset which in fact had been spent in order to obtain relief from this court under Section 77b?

A. Are you referring to the reorganization?

Q. I don't know whether you call it reorganization; I am referring to the matter of getting a five-year extension of the time and the amortized payment of principal under the bond issue.

A. Can you direct your finger at the \$25,000 in the report?

Q. I will ask you to direct yours. It was during the three years that you were speaking of that what you call the reorganization occurred, wasn't it?

(Testimony of A. W. Haynes.)

A. I believe it was 1936, was it not?

Q. Well, isn't that within the three years? I think it was in 1936 or 1937. From your audit what did you find that that five-year extension of the time cost the company by way of paying out money?

A. I could not give you the amount without reference to the detailed work papers, for this was included in the amount of \$36,900 under the caption of Unamortized Reorganization Expense and Bond Discount Expense.

Q. As of December 31, 1938 did you include in that statement of yours an item of \$36,927.04?

A. Yes.

Q. What was that item? Do you know what it was made up of?

A. In early years the company had a bond issue. These corporations have certain expenses in connection with floating a bond issue. This company also sold the bonds at something less than par. It is common practice among corporations to defer the [278] amount of such payment over the life of the issue itself. As to the detailed charge of that, I would have to have the detailed working papers.

Q. Your final answer is you don't know what makes up that final item of \$36,900?

A. I have not made any inquiry.

Q. What would make it up?

A. I could not tell you the precise nature of the item expense other than the items I told you of.

Q. Can you tell whether or not during the three years of your audit which embraced the period of

(Testimony of A. W. Haynes.)

the five-year extension, can you tell us anything, tell the Judge anything with respect to whether or not the company paid out around \$25,000 in order to get that five-year extension?

A. I don't know what the amount was, but it certainly spent some money, otherwise you would not have the caption in here "Reorganization Expense" which is written off over the life of the bonds, which is again common practice.

Q. Let me put it to you this way: Assuming that the amount was \$25,000, I think that is correct, and we paid out for attorneys and for printing, and for one thing and another, in order to get that five-year extension out here in court, that is money that is paid out really as an expense to get that extension. Now, you would take that \$25,000 and instead of charging it off in that year as expense you would put it on the asset side of the firm assets, wouldn't you?

A. Yes.

Q. So, for all you know, that \$36,000-odd, that includes \$25,000 of money that had been paid out for expenses, and after getting through your audit you carry it as an asset and include it in what you call the net worth; is that right?

A. Yes.

Q. Now, as a matter of fact, that is nothing but a bookkeeping [279] transaction for the simple purpose of distributing that expense over a period of years?

A. That is true.

Q. But after you close the audit and look around for the assets, there is \$25,000 that you would not find there at all; isn't that right?

(Testimony of A. W. Haynes.)

A. That is right.

Q. Now, this appraisement that you spoke of was back in 1927? A. Yes.

Q. Do you know whether that was a fire insurance appraisal? A. No, I do not.

Q. You don't know one way or the other?

A. No.

Q. Fire insurance appraisals, by reason of the nature of the way that fire insurance company business is conducted, are appraisals based on the cost of reproduction less depreciation, isn't that right?

A. A fire insurance appraisal is based on what they call insurable value.

Q. It in turn is based on reproduction less depreciation, isn't it?

A. It is based on sound value at reproduction cost less depreciation.

Q. I am speaking in terms of the insurance policy under which they agree to pay you if your building burns down, what it would cost to reproduce that entire building less depreciation. You understand that, don't you? A. Yes.

Q. And that takes no regard whatever of obsolescence, does it?

A. I could not say that; I am not an appraiser.

Q. So you do not purport as you sit there as one of the members of Haskins & Sells to vouch for that appraisal one way or the other with respect to whether these buildings were worth that?

A. No.

(Testimony of A. W. Haynes.)

Q. You do not purport, do you, to say that whatever buildings were there, they were being kept up in a proper state of [280] repair? You did not go into that, did you?

A. Do you mean to infer that we don't inquire into it?

Q. No, I am asking you whether you went out and visited the buildings to see if they were being kept up properly and being kept in repair.

A. We always make some inspection of the buildings. We do not go to all of them.

Q. Tell me this: In the three years that you speak of did Haskins & Sells make any physical examination of the buildings to see if they were being kept up in good repair, or whether the repairs were being let run behind? A. I could not say.

Q. Now, you know, don't you, that in looking over the books you found that the company had written in the books what are known as the write-up of assets? A. Yes.

Q. And that write-up of the assets in connection with the land was put in \$148,000 more than the books showed its cost or value? A. Yes.

Q. You do not purport to tell the Judge anything as to what the books show with respect to the land, do you? You did nothing to see that the land is or is not worth so much?

A. That is true.

Q. So, as far as you are concerned, you are taking somebody else's figures from the books as to

(Testimony of A. W. Haynes.)

what the books show on the land, and you assume the correctness of that for your audit?

A. I think that is an unfair inference.

Q. I am asking the question; I am simply putting the question.

A. We feel that we have a right to rely on the findings of an expert in certain matters; we are not appraisers of buildings and land and property.

Q. Then your audit report and your statement of net worth comes down to this, doesn't it, that finding on the books someone [281] else has put such and such a value down there, you assume the correctness of that and proceed accordingly?

A. You can put it that way.

Q. I am putting it that way. What is the answer? A. Yes—the answer is yes, twice.

Q. Now taking December 31, 1938, state to the Court on one side what you reported as the current assets of the corporation and on the other side what you reported as the current liabilities.

A. The current assets were stated in the report to be \$67,672.41 and the current liabilities were stated to be \$186,856.61.

Q. The current liabilities, then, according to the audit, were roughly about three times the current assets as of December 31, 1938? A. Yes.

Q. That is a pretty sick condition for a company, isn't it? A. It is not healthy.

Q. Well, I will go further: It is a pretty sick condition, isn't it?

(Testimony of A. W. Haynes.)

A. I think we say the same thing.

Q. I will assume both statements are right. Now, as a matter of fact, your audit shows as of December 31, 1938, that the company had nowhere near enough cash on hand even to pay taxes, isn't that correct?

A. I will have to see the report for that. I recall, however, about \$6,000 cash.

Q. About \$25,000 in taxes, was it not?

A. \$25,000 in taxes.

Q. Now, as a matter of fact, with current assets only of about one-third the current liabilities—that all depends on whether the receivables shown under the assets work out all right, doesn't it?

A. Yes.

Q. That was merely a guess as to whether they would or not; that is all it amounts to, is it?

A. Yes.

Q. But so far as the current liabilities are concerned, they [282] knew there was no way of reducing them. They owed \$186,000 and they might or might not have so much as \$6,000 or \$7,000 on hand to meet them; isn't that correct?

A. That is true.

Q. You don't know whether the company made or lost money before 1936, do you?

A. I could not say.

Q. You don't know whether the company did or didn't make money after 1938, do you?

A. No, I have no knowledge after 1938. Going

(Testimony of A. W. Haynes.)

back to the preceding question, I would say that I don't know whether it lost money prior to 1936. They had, however, an accumulated deficit at the beginning of 1936 of \$165,000, so it would seem fair to assume that they lost some money prior to that.

Q. Especially year after year, if you look into it. That is all.

The Court: Q. You mentioned the American Appraisal Company. What is that?

A. The American Appraisal Company is the leading company of its type in the country. It has its home office in Milwaukee, Wisconsin, with branch offices all over the country making appraisals in connection with construction work, insurance work, and, as counsel said, very frequently, less now than formerly, for underwriters. This appraisal was made at the time of the bond issue for the purpose of getting the equity back of the bonds. The bonds were floated up to 60 or 80 per cent of the appraised value of the property.

Mr. Naus: One moment.

The Court: I am asking the question for my own information. I wanted to know what company it was that made this original appraisal.

The Witness: The way it worked, they had men who were experts in construction costs, and they have statistics running [283] back for years.

Mr. Naus: I think they are a well known company.

Q. But the fact is, is it not, that in making their

(Testimony of A. W. Haynes.)

appraisals they make them upon current prices that are quoted for materials and the like?

A. They will fluctuate.

Q. That is to say, in making an appraisal in boom times, back in 1927, they, following the standard appraisal practice, would base their appraisal on the cost of lumber and material, nails and everything as of that time? A. As of that time.

Q. Whatever the current prices are?

A. Yes.

Q. And if the market broke after 1927 on materials and construction and the like, if they made a re-appraisal after the break in the market they would put the appraisal a great deal lower than they made it in 1927, wouldn't they?

A. The appraisal would be at the lower figure, but the depreciation would be less than the company had provided for reserve.

Q. For reserve of what?

A. Reserve for depreciation.

Q. But they have the same depreciation; you say it is a composite? A. Yes.

Q. If the unit prices were lower subsequent to 1927 and you have the same rate of depreciation, it would end up with an appraisal after depreciation of substantially less, wouldn't it?

A. If you are taking your depreciation on the lower basis, you are lowering your depreciation.

Q. We are getting away from the question of value and we are talking about an operation which

(Testimony of A. W. Haynes.)

I have not questioned you about. You know that to be so? A. Yes.

Redirect Examination

Mr. Scampini: Q. The Merchants Ice & Cold Storage Company is a public utility corporation?

A. A public utility corporation [284] under the jurisdiction of the Railroad Commission.

Q. All of its audits and appraisals and monthly earnings statements are required to be filed with the Railroad Commission?

A. They have to be filed.

Q. And the rates which the company is entitled to charge are fixed by the Railroad Commission?

A. That is right.

Q. And arrived at on the basis of a fair return on its invested capital?

A. That is the way the Railroad Commission works.

Q. These appraisals made in 1927 have been used for that purpose, do you know that?

A. I do not know that.

Mr. Naus: Q. Mr. Haynes, how can you say that the Railroad Commission gives them a fair return if it can return nothing but red ink for ten or twelve years?

A. The Railroad Commission is supposed to do that. Most of the public utilities disagree with the Railroad Commission.

Q. What it comes down to is the Railroad Commission has control over the rates, but whether the company makes money or not is another matter?

(Testimony of A. W. Haynes.)

A. The Railroad Commission fixes the rates, that is true, and has its own formula for arriving at those rates, which the utilities usually disagree with.

Q. In the three years of your audit do you say the company had a fair return on its investment?

A. It did not make money.

Q. Had nothing but red ink?

A. That is right.

(Thereupon counsel read the deposition of L. R. Arnold.)

Mr. Brownstone: Now, in connection with the deposition that was read, we would like to offer in evidence the series of letters that have been handed to me by Mr. Scampini.

Mr. Scampini: I have no objection, but I would like to [285] know the judicial purpose of it.

Mr. Naus: Mr. Scampini, either there is an objection or there is not an objection.

Mr. Scampini: I say I have no objection, but I see no use or purpose.

Mr. Naus: Then go ahead and read them.

The Court: I think I indicated they might or might not become material. I don't know the contents of the letters.

Mr. Naus: Correct.

(Testimony of A. W. Haynes.)

The Court: If you want a judicial interpretation, let us hear them.

Mr. Brownstone: There is no objection, so we will offer them, as one exhibit.

The Court: They may be admitted and marked.

(The letters were marked "Defendants' Exhibit D.")

DEFENDANTS' EXHIBIT D

THOMAS H. WINGATE

Attorney at Law

Equitable Building

Wilmington, Delaware

July 16, 1942

Pacific Empire Holdings, Inc.

26 O'Farrell Street

San Francisco, California

Dear Sirs:

I have been retained by a group of stockholders of Pacific Empire Holdings, Inc. who have requested that I file a Bill of Complaint against the corporation, seeking the appointment of a receiver on the ground of mismanagement and for the purpose of having a receiver to bring stockholders' derivative action against the individual directors for mismanagement and waste of the corporate assets. The stockholders also request that I file a petition for a Writ of Mandamus to secure a full and complete examination of the corporation's books and records.

(Testimony of A. W. Haynes.)

(Defendants' Exhibit D—Continued)

I am reluctant to resort to these extraordinary remedies without giving the management an opportunity to state their position. If you care to discuss these proceedings with me, I shall be glad to do so. In the event I do not hear from you on or before July 29th, I shall understand that you do not wish to discuss the matter, and I will proceed to file the proceedings.

Very truly yours,

THOMAS H. WINGATE

W/mlt

WESTERN UNION

Nite Letter

July 27, 1942

Mr. Ivan Culbertson

Attorney at Law

Delaware Trust Bldg.

Wilmington, Delaware

I represent Pacific Empire Holdings Inc., a Delaware corporation, with offices here in San Francisco. Thomas H. Wingate of your city threatens to file suit in your Chancery court for appointment of receiver in a derivative stockholders' suit. Please see if you can talk Mr. Wingate into deferring any action until I have looked into this matter and reported to you. I want you to do this as a personal favor to me, without liability on company as com-

(Testimony of A. W. Haynes.)

(Defendants' Exhibit D—Continued)

pany may not be in position to pay it. Wire me collect. Kindest personal regards.

A. J. SCAMPINI

WESTERN UNION

NF 205 48 Collect—Wilmington Del 30 952A

1942 Jul 30 AM 7 42

A J Scampini

300 Montgomery St S Fran

Conferred with Wingate re Pacific Empire Holdings Inc He agrees to defer filing complaining for reasonable time for you to advise me further. He feels sure he has strong case for receiver and gave me generally his facts. Ave assured him you will not delay unduly. Regards.

IVAN CULBERTSON

August 2, 1942

Mr. Ivan Culbertson,
Attorney at Law,
Delaware Trust Building,
Wilmington, Delaware.

Dear Mr. Culbertson:

Re: Pacific Empire Holdings, Inc.

Since my wire to you of July 29 and your reply of July 30, with respect to the above subject matter, I have been engaged almost continuously in conferences with the officers of the corporation, all

(Testimony of A. W. Haynes.)

(Defendants' Exhibit D—Continued)

of whom are fine men but who, unfortunately, have had an impossible task.

Pacific Empire Holdings, Inc. was formerly known as Calitalo Investment Corporation and also as Associated Calitalo Holdings, Inc., and was organized sometime in 1926 during the boom days and its promoters had the "laudable" ambition of creating a second Bank of Italy organization. They acquired a string of banks up and down the coast and sold approximately two and a half million shares of stock to about 10,000 stockholders. In addition to a string of banks they acquired several other corporations, among them the controlling interest in Merchants Ice and Cold Storage Company, a California corporation, operating the largest cold storage business in San Francisco, and complete ownership of California Pacific Service Corporation, operating a rather large laundry business in Bakersfield.

To make a long story short for the purpose of this letter—with the crash of the market in 1929 and the ensuing depression the corporation lost bank after bank and was subjected to assessment after assessment on its stockholders liability with the result that it became more and more financially involved. The promoting management of the corporation was finally ousted and the present management took office sometime in 1930 and have been conducting a salvaging proposition ever since.

(Testimony of A. W. Haynes.)

(Defendants' Exhibit D—Continued)

For some years I was attorney for the present management but sometime in 1937 I resigned.

The last bank which the corporation owned was the City National Bank of San Francisco which was merged with the Pacific National Bank of San Francisco and as the result of such merger the above corporation became the owner of a block of stock of Pacific National Bank of San Francisco, which block of stock was owned by another subsidiary called the Pacific Empire Corporation. (Organized by myself in 1933 and, incidentally, that corporation has the honor of having filed the first Registration Statement with the Securities and Exchange Commission under the Securities Act of 1933).

The series of assessments levied upon the corporation as a stockholder of the closing banks, coupled with the fact that the Merchants Ice and Cold Storage Company, is principal operating subsidiary, entered upon evil days during the depression, froze the holding company and forced it to liquidate its holdings, including Merchants Ice and Cold Storage Company, at sacrifice prices—yet its liabilities had to be paid in full in every case. The result is that today the corporation owes approximately \$50,000 to general creditors and approximately \$100,000 to its subsidiary, Pacific Empire Corporation, in which subsidiary the corporation owns only 55% of its outstanding stock, the rest being owned by the public.

(Testimony of A. W. Haynes.)

(Defendants' Exhibit D—Continued)

Its only remaining visible assets that I can find are the California Pacific Service Corporation stock which is pledged to secure the payment of approximately \$10,000 to the lawyers who took charge of the situation after my resignation in 1937, and who were engaged to fight some income tax assessments, and some odds and ends.

The really only valuable asset of the holding company is a claim against one Peter Bercut, Vice President and Director of the corporation, who, about a year ago, knowing the financial difficulties of the corporation and being a man possessed of considerable wealth, took advantage of the difficulties and of his position to buy the controlling interest of the corporation in Merchants Ice and Cold Storage Company for the sum of \$35,000 cash when such controlling interest was worth and is worth today not less than \$250,000. This transaction is the transaction which must be rescinded in order to reacquire into the company this very valuable asset so as to make it available to the creditors of the corporation and its stockholders.

The present management is not in a position, practically speaking, to rescind the transaction entered into with Peter Bercut, for the reason that the present management was a party to the transaction. Neither is the corporation in a position to attack the transaction, in a practical sense, for the reason that Merchants Ice and Cold Storage Com-

(Testimony of A. W. Haynes.)

(Defendants' Exhibit D—Continued)

pany claims it has coming approximately \$25,000 from the holding company and since Peter Bercut now owns the Merchants Ice and Cold Storage Company, and runs it, if the corporation were to attempt to rescind the transaction whereby Peter Bercut acquired the said controlling interest he would, logically enough, direct and see to it that Merchants Ice and Cold Storage Company file an attachment and execution on the claim and thus vitiate the proceeding.

Do you get the picture? The corporation has no cash on hand. It has not paid its franchise taxes or corporation trust company fees or Delaware franchise taxes. It is, in other words, insolvent within the meaning of Section 4407 of the revised code of Delaware of 1935 and by reason thereof a receiver should be appointed in Delaware to take charge and possession of all of the assets and effects of the corporation and forthwith rescind the transaction with Peter Bercut and any other transactions of a similar character which may be found to exist.

Any receiver of this corporation so appointed should be what we lawyers understand as a "friendly receiver". I am a creditor of the corporation to the extent of having an unpaid balance due on a note equalling \$500. I also own 3263 shares of the stock of this corporation which years ago cost me considerable money and today is worthless. (When I think

(Testimony of A. W. Haynes.)

(Defendants' Exhibit D—Continued)

of the investments I have made I often wonder why I practice law.)

I suggest the following procedure. I will assign the promissory note to your secretary, Rebecca Tanzer, and transfer the stock to some other person designated by you. Let these two persons, one as a creditor and the other as a stockholder, file a complaint alleging insolvency or imminent threat of insolvency and inability to meet the debts as they mature; alleging further that the corporation can be made solvent by the preservation and conservation of its assets and the prosecution of the claims which it has against persons like Peter Bercut and others; alleging further that the corporation owns no real estate anywhere and all of its property consists of personal property so as to come in within the subsequent provision, namely: Section 4408 of your revised code. See page 305 of the Delaware Corporation Law, annotated 1941.

I can prepare the form of complaint for you, knowing as I do the history of the organization. I would then file the complaint and serve it upon Corporation Trust Company, its resident agent. The Board of Directors here would call a special meeting and adopt a resolution consenting to the appointment of a receiver. The receiver then could designate an agent to represent him here in California, in accordance with Section 4407 of your Revised Code of 1935. I, as such agent, or anybody

(Testimony of A. W. Haynes.)

(Defendants' Exhibit D—Continued)

else appointed as such agent, could take possession of the local offices and represent the receiver in California. Under our decisions a receiver appointed by the courts of a sister state need not be appointed ancillary receiver in order to be entitled to prosecute actions in the courts as such receiver. He need only be appointed ancillary receiver when it is the owner of real estate, and in our case there is no real estate.

Upon the appointment of such receiver the first thing to do would be to rescind the transaction whereby Peter Bercut acquired the controlling interest of Merchants Ice and Cold Storage Company. I am sure that this case would be settled very quickly. Any kind of reasonable settlement should enable the corporation to pay off all of its claims, pay a good fee to the receiver and its attorneys, etc., etc., and probably leave something available for the stockholders.

I have gone into all of the ramifications of the circumstances under which Peter Bercut, while Vice President, Director and member of the Executive Committee, acquired for \$35,000 the controlling interest in Merchants Ice and Cold Storage Company. I think you know me well enough to know that I do not reach hasty decisions in cases of this character. I can tell you, however, that I will win this case hands down and from the result of this

(Testimony of A. W. Haynes.)

(Defendants' Exhibit D—Continued)

phase of the situation ought to come assurance of payment for our services.

I think the corporation can raise about \$500 to assure payment of court costs to initiate the foregoing suggested proceeding. What I want to know from you is can you handle it along the foregoing suggested lines? Do you know Wingate well enough, or anybody else, to arrange with him to represent the plaintiffs in filing the complaint while you appear as attorney for the corporation in consenting to the appointment of a receiver, and do you think that you can have the Chancellor appoint the proper receiver?

Wire me your reaction.

Yours very truly,

A. J. SCAMPINI

AJS:hw

WESTERN UNION (23)

PA4 1 84—DL—DT Wilmington Del 6 949A

1942 Aug 6 AM 7 29

A J Scampini—

300 Montgomery St SFran—

I have studied carefully your letter of August 2. Your plan feasible and can work out on suggested lines. You should move rapidly as Wingate insisting on going ahead with his complaint. Suggest Wingate for receiver. He will cooperate. Essential you send five hundred dollars to assure carrying

(Testimony of A. W. Haynes.)

(Defendants' Exhibit D—Continued)

out of plan and payment of costs and expenses. Assign your note at once to Tanzer and your stock to Elizabeth Wilhelm. Suggest you send complaint at once as I cannot hold situation here indefinitely. Regards.

IVAN CULBERTSON.

2.

IVAN CULBERTSON

Law Offices

220 Delaware Trust Building

Wilmington, Delaware

August 17, 1942

A. J. Scampini, Esquire

300 Montgomery Street

San Francisco, California

Re: Pacific Empire Holdings, Incorporated

Dear Mr. Scampini:

This will acknowledge receipt of your letter enclosing your check to my order in the amount of \$250.00, as an advance on the deposit for costs in the case against Pacific Empire Holdings, Incorporated. I have prepared and filed the Bill of Complaint and enclose herewith a copy of the same. You will receive notification from the Corporation Trust Company that the Complaint has been served on it.

I have also prepared a form of Answer which

(Testimony of A. W. Haynes.)

(Defendants' Exhibit D—Continued)

should be executed by the President or Vice-President and Secretary of Pacific Empire Holdings, Incorporated and returned to me at the earliest possible moment. I will then engage a local attorney to represent the corporation in filing the answer and appearing before the Chancellor to consent to the appointment of a receiver.

It will be necessary that you send me at once the additional \$250.00 for the costs in this case. As you know, the expenses of a receivership are heavy, and I am unwilling to incur these expenses until I have been supplied with the means of paying them. However, I assume there will be no delay about carrying out your agreement, and for that reason I have gone ahead with the filing of the Complaint.

As soon as the executed Answer is received by me, I can proceed at once to the securing of the appointment of the receiver. We will then expect you to proceed with all dispatch in California to make the former officers respond in damages suffered by this corporation.

With kind regards, I am

Very truly yours,

IVAN CULBERTSON

IC:RT

Enc.

(Testimony of A. W. Haynes.)

(Defendants' Exhibit D—Continued)

August 22, 1942

Mr. Ivan Culbertson

Attorney at Law

Delaware Trust Bldg.,

Wilmington, Delaware

In re Pacific Empire Holdings, Inc.

Dear Ivan:

I enclose certified copy of minutes of a special meeting of the board of directors of Pacific Empire Holdings, Inc. held August 20, 1942, in connection with the complaint filed by Rebecca Tanzer and Elizabeth Wilhelm against the corporation seeking the appointment of a receiver by the Court of Chancery of the State of Delaware in and for the County of New Castle.

You will note that at the meeting a resolution was adopted authorizing a lawyer of Wilmington, Delaware, to appear in said action as attorney for the defendant corporation and in said action file the enclosed answer of the defendant, which has been duly executed and notarized by the officers of the corporation consenting to the appointment of the receiver. I left the name in blank for the reason that I had assumed you would appear as attorney for the corporation, whereas you now advise me that you will appear as attorney for the plaintiffs and that you will select some attorney in Wilmington to appear for the corporation.

(Testimony of A. W. Haynes.)

(Defendants' Exhibit D—Continued)

Please advise me the name of the attorney you will select who will appear for the corporation so that I may insert his name in the original minutes appearing in the minute book.

I enclose my check for \$250.00, being the remaining \$250.00 for costs requested by you in your letter of August 17th.

As soon as the receiver has been appointed, please wire me, and, instead of obtaining an order of the court appointing me as agent in California for the receiver, I recommend that E. R. Prince, a well-known business man of San Francisco and a valued client of mine, be appointed resident agent and that I be appointed attorney for the receiver in California, thus enabling us to take immediate possession of the local offices and proceed with all dispatch towards the marshalling of the assets and prosecution of all claims owned by the company. If a bond be required from Mr. Prince, that can easily be arranged.

Time is of the essence. In order for us to proceed here, we will also have to have, as soon as possible, certified copies of the order of the Chancellor appointing the receiver and appointing the receiver's agent in California and designating me as the attorney for the receiver's agent in California, and authorizing us to take possession and conduct the business and affairs of the corporation until the

(Testimony of A. W. Haynes.)

(Defendants' Exhibit D—Continued)

further order of the court and subject to the jurisdiction and orders of the receiver.

Kindest personal regards,

Very truly yours,

A. J. SCAMPINI

AJS:h

Enc.

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22339R. Defts. Ex. No. D. Filed 5-5-43. Walter B. Maling, Clerk. By J. P. Welsh, Deputy Clerk.

C. J. COLLINS,

called for plaintiff; sworn.

Direct Examination

Mr. Scampini: Q. Mr. Collins, you are connected with the Frostcraft Corporation, are you not?

A. That is right.

Q. That is a California corporation?

A. Yes.

Q. Located where?

A. At 185 Lombard Street.

Q. How long have you been in business?

A. Since March 1, 1937.

Q. Frostcraft Corporation was formed through the efforts of Merchants Ice & Cold Storage Company and Pacific Empire Holdings, Inc., was it not?

A. No, it was not.

(Testimony of C. J. Collins.)

Q. Please tell me, then, its history.

A. Well, four of us started the corporation, and one of the parties worked for the Merchants Ice & Cold Storage Company and he put in money, and [286] we had the matter lined up four ways.

Q. Who owned it?

A. Myself, George Botello, John Hawkins, and Mr. Sherman.

Q. Of the Merchants Ice & Cold Storage Company? A. Yes.

Q. You took a lease of a building from the Merchants Ice & Cold Storage Company, did you not?

A. Yes.

Q. You entered into some sort of contract for the freezing of vegetables and fruits, is that right?

A. We did not have any contract with them, but it was understood that they would do the freezing.

Q. What is the business of the Frostrcraft Corporation?

A. Freezing fruits and vegetables.

Q. Well, if I understand correctly, the Frostrcraft Corporation had a difficult time going ahead, for a while, is that right? A. That is right.

Q. How is it doing now?

A. It is doing much better.

Q. You are selling your products, are you?

A. Yes.

Q. Did the Pacific Empire Holdings, Inc. make any investment in the company?

A. Yes, they made an investment of 200 shares.

(Testimony of C. J. Collins.)

Q. How much is that? A. \$2,000.

Q. Did Merchants Ice & Cold Storage Company make an investment in the company?

A. No, they did not.

Q. Did you become indebted to Merchants Ice & Cold Storage Company for refrigeration?

A. Yes, we did.

Q. How is that indebtedness today?

A. Well, it is improved. I will put it this way: that last year we were able to keep up our current bill, and of course, we still owe for previous years' freezing, part of the bill. [287]

Q. Are you earning any money now?

A. Yes, we had a fairly good year last year.

Q. Now, did the Merchants Ice & Cold Storage Company acquire 500 shares of stock in your company? A. No, they did not.

Q. Do your records show that Merchants Ice & Cold Storage Company became a stockholder in your company? A. No, they don't.

Q. Do you remember stating to me that the Merchants Ice & Cold Storage Company acquired 500 shares of stock in your company?

A. No, not the Merchants Ice & Cold Storage Company.

Mr. Naus: Are you impeaching him now?

Mr. Scampini: I am taken by surprise.

Q. Will you please show me your stock ledger?

A. Yes.

Q. Do you have a certificate for 500 shares of

(Testimony of C. J. Collins.)

the A. M. C. Produce Co.? A. Yes.

Q. Will you please show me that certificate?

A. That is certificate No. 4 for 500 shares issued to the A. M. C. Produce Co.

Q. To whom was this certificate transferred?

A. This certificate was transferred to Peter Bercut and Henri Bercut.

Q. Where did it come from? Who sent it in to you for transfer? A. Mr. Plagaman.

Q. Is he treasurer of the company, as far as you know?

A. I know him as the bookkeeper. I don't know what other title he has.

Q. Have you got the instructions that he sent to you for transfer? A. No, I have not.

Q. Was that certificate ever the property of the Merchants Ice & Cold Storage Company?

A. No, not that I know of. All I [288] know is that Mr. Plagaman brought the certificate up with instructions to issue 250 shares to Mr. Peter Bercut and 250 to Henri Bercut.

Q. Is Mr. Peter Bercut and Mr. Henri Bercut a stockholder in your company?

A. Yes, to the extent of 250 shares.

Q. And the representation of that ownership is this certificate that you have just testified to?

A. Yes.

Mr. Scampini: That will be all.

(Testimony of C. J. Collins.)

Cross Examination

Mr. Naus: Q. Mr. Collins, you spoke of somebody buying some block of stock for \$2,000. When was that?

A. That was in the early part of 1940.

Q. Who made the arrangements with you for the purchase of the stock, what person?

A. Webb Richards is the one that made the request for the stock and instructed me to make it out to the Pacific Empire Holdings Company.

Q. Let me ask you this. If this is the situation, I will scramble it together and save time, if I can. At about the time that that stock was issued Frostcraft owed the Merchants Ice & Cold Storage Company about \$2,000 on a storage bill, Frostcraft issued its check for \$2,000 and then in turn Merchants Ice & Cold Storage Company issued its check for \$2,000 to buy the stock, and it ended with Merchants Ice & Cold Storage buying it and Pacific Empire having it issued to them; is that about the general picture?

A. No, that is not the procedure on that stock. The procedure was I did owe the Merchants Ice & Cold Storage money and they gave me a check for \$2,000. It was of the Pacific Empire Holdings Company. And I issued the stock and then I gave the Frostcraft check. That is, we paid up the Merchants Ice & Cold Storage \$2,000. [289]

Q. To boil it all down, when the transaction was all over with, it wiped out the \$2,000 bill you owed

(Testimony of C. J. Collins.)

for storage and you issued 500 shares of stock. That is what it all boils down to? A. Yes.

H. R. BAKER,

called for plaintiff; sworn.

Direct Examination

Mr. Scampini: Q. Mr. Baker, your name is H. R. Baker? A. Yes.

Q. What is your business or occupation?

A. Senior partner with H. R. Baker & Company, investment securities.

Q. How long have you been in business?

A. H. R. Baker & Company have been in business since 1933.

Q. How many offices do you maintain?

A. Fourteen.

Q. Where are they located?

A. All throughout California from San Diego to Eureka.

Q. How many salesmen are there in your organization?

A. About fifty-five men; not all of them are salesmen.

Q. Prior to organizing the firm of H. R. Baker & Company what were your activities?

A. I was in the investment business for a large New York house.

Q. In New York City?

(Testimony of H. R. Baker.)

A. In New York City and Pittsburgh, Pennsylvania, and in San Francisco.

Q. When did you come to San Francisco?

A. I came to San Francisco in January, 1932.

Q. Are you a member of any exchange?

A. Not at the present time.

Q. Have you been a member of an exchange?

A. Yes, for some time I held a membership on the San Francisco Stock Exchange. [290]

Q. Is your business strictly unlisted securities?

A. Primarily.

Q. Have you had occasion to examine into the financial report of Merchants Ice & Cold Storage Company which I have given to you, the audit for the year 1939 prepared by John F. Forbes & Company?

A. Yes.

Q. I will show it to you and ask you whether or not this is the audit that you studied?

A. Yes, this is the audit.

Q. Have you studied the audit for this company fully, Mr. Baker?

A. Well, not fully. I would say I looked at this audit quite carefully, and of course in studying an audit of this type you have to take into consideration the fact that there are certain figures here based on appraisals made by reputable appraisers, and on which you have got to take their word that these appraisals are accurate.

Q. From your experience in unlisted securities are you in a position to state whether or not when a majority of the stock is owned by a concern and

(Testimony of H. R. Baker.)

there are occasional sales transactions on outstanding stock, whether the market for such stock and such transactions reflect the true reasonable value of those securities?

A. Not necessarily. It all depends on where the control is and what kind of a control it is and what they are doing for the outside stockholders.

Q. Where a situation exists that the transactions are very rare and only involve a small number of shares, and the purchasing power, as it were, is limited to the controlling interest, would the price at which such securities would occasionally be sold be a true reflection of the reasonable value?

A. I would say they would have no reflection on the reasonable value, unless the parties who were making the market wanted to make it such. [291]

Q. Now, in the case of Merchants Ice & Cold Storage Company, Mr. Baker, after examining that balance sheet and the balance sheet for December 31, 1942, December 31, 1940, and the earnings reports for those two years, as well as the audit report of John F. Forbes & Company dealing with 1939, are you in a position to state what in your opinion would be the reasonable value of approximately 65,550 shares of common shares of common stock out of 107,000 shares outstanding and 12,000 shares approximately of preferred stock out of a total of 41,000 shares outstanding on December 31, 1940?

Mr. Naus: If your Honor please, it is obvious that the question is designated to elicit from an open account, from a security man, what now ap-

(Testimony of H. R. Baker.)

pears to be an attempt to make an intrinsic appraisal of intrinsic assets of the corporation, coupled with a substitute of the witness' opinion for the function of your Honor by way of an opinion from a balance sheet, and I object to it as calling for the opinion, conclusion, guesswork, substitution of the witness' opinion for the Court's; and on the further ground that no foundation has been laid that this witness knows about appraising assets as distinguished from the proper sphere of a broker to testify to the condition of the market, if there is a market.

The Court: There is a suggestion I might offer which may or may not be helpful. From an examination of these documents here and these appraisals he may testify what is his opinion, limiting it to the information at hand.

Mr. Naus: He is going to be called upon to testify to the fair value.

The Court: I don't know what he is going to be called upon to testify. I offer that suggestion to both sides. [292]

Mr. Naus: When it gets down to it, this witness was asked to look at a balance sheet subsequent to the transaction here and in the absence of a market say what is the intrinsic value of the shares.

The Court: That goes to the weight of his testimony, if it has any weight at all. Now, as to saying he is invading the province of the Court, I may answer that very frankly to you by saying that any

(Testimony of H. R. Baker.)

help I may get on any financial matter may be of assistance in the case.

Mr. Naus: I suppose your Honor has overruled my objection?

The Court: I will overrule the objection subject to your motion to strike. Proceed.

A. I have not had a chance to examine this 1942 or 1940 balance sheet, and before answering the question based on those I would want an opportunity to study these. I have studied the 1939 balance sheet and earning report, but if I were going to take into consideration what happened since those balance sheets, I would want more opportunity to study these sheets, which I have not had.

The Court: Q. Being a broker, what has been your experience in reference to valuing parcels of property?

A. I might say that for twelve years I was associated with the largest real estate bond house as vice-president and director. Perhaps I should not brag about this, because that firm failed,—that was Strauss—but they changed the skyline of most cities of the United States, such institutions as the Mark Hopkins.

Q. They still line the skies today. The point I wanted to make is this: I wish to straighten out in my own mind this: In determining the values what part, if any, does management play in the corporation in reference to values?

A. A very great [293] part.

(Testimony of H. R. Baker.)

The Court: I thought so myself, but I wanted to get the benefit of an expert. What is before the Court now?

Mr. Scampini: Now I will ask permission for Mr. Baker to study the 1940, 1941 and 1942 reports and return to court tomorrow morning.

The Court: I do not want to mislead you—I would be interested in any appraisal that this gentleman would try to assist me in in the morning, but I do not want to mislead anyone to say that it might or might not impress me.

Mr. Scampini: I understand that. I will ask Mr. Baker to return tomorrow morning.

The Court: Very well.

W. G. EVANS,

called for plaintiff; sworn.

Direct Examination

Mr. Scampini: Q. Mr. Evans, are you the book-keeper and auditor of the Merchants Ice & Cold Storage Company at the present time?

A. No.

Q. You are not connected with the company?

A. I am general manager at the present time.

Q. Have you got with you the appraisal made of the company's property by the American Appraisal Company? A. No.

Q. Is that available to you? A. 1927?

(Testimony of W. G. Evans.)

Q. Yes. A. I think I can get that.

Q. Have you got the assessed values of the company's property available to you?

A. I think counsel has them now.

Mr. Naus: I have a handful of tax bills. They are not added up. If you want to take them along and add them up [294] over night, you may. We have never done it.

Mr. Scampini: Q. Will you bring the appraisal with you in the morning for 1927? A. Yes.

Mr. Naus: Is there anything else you want him to bring?

Mr. Scampini: No. At this time we wish the record to show we offer in evidence the deposition of Mr. Arnold* which has been read in evidence.

The Court: Let it be admitted. We will take an adjournment now until tomorrow morning at ten o'clock.

(Thereupon an adjournment was taken until Thursday, May 6th, 1943, at 10 a. m.) [295]

Thursday, May 6, 1943—10:00 A. M.

Mr. Scampini: May it please the Court, I had occasion to bring Mr. Morrish down last evening and he is a very busy man. May I put him on at this time?

The Court: Yes.

*[Printer's Note]: Set forth herein at page 693.

WILL E. MORRISH,

called for plaintiff; sworn.

Direct Examination

Mr. Scampini: Q. Mr. Morrish, where do you reside?

A. I reside in Berkeley.

Q. What is your present business or occupation?

A. I am president of the Calvada Lumber Company and of the Meadow Valley Lumber Company, and I am an adviser to some other business firms.

Q. Prior to your present business activity were you connected with the American Toll Bridge Company?

A. I was.

Q. In what capacity?

A. I was president of the American Toll Bridge Company.

Q. That company owned the bridge across Carquinez?

A. That is correct.

Q. Antioch?

A. One at Antioch and one at Carquinez.

Q. Those bridges were sold to the State and the company has since been dissolved, is that right?

A. That is right.

Q. Prior to that were you connected with the Bank of America?

A. I was.

Q. In what capacity, Mr. Morrish?

A. I was president of the Bank of America.

Q. For how many years?

A. About three and one-half years. [298]

Q. During what period of time?

(Testimony of Will E. Morrish.)

A. From about the first part of 1931 until the end of 1934.

Q. Prior to that time were you associated for many years with the Bank of America?

A. Yes, I was associated with them about eight years.

Q. In what capacities?

A. Originally as executive vice president.

Q. Prior to that time what were your activities?

A. I had my own bank in Berkeley.

Q. What was the name of that bank?

A. First National Bank of Berkeley.

Q. Now, are you connected with any of the building and loan associations? A. Yes.

Q. Which one?

A. The Building and Loan in Berkeley, Berkeley Guaranty Building and Loan Association.

Q. What is your position there?

A. I am just a director.

Q. How long have you been a director of the loan association?

A. Ten or fifteen years. I can't recall.

Q. In your business career as banker and otherwise, have you had occasion to appraise properties and make loans on such appraisals?

A. I have.

Q. Have you made loans on securities, collateral?

A. Yes.

Q. Now, is it the fact or is it not that during the year 1937 or thereabouts you became a director of the Merchants Ice & Cold Storage Company?

(Testimony of Will E. Morrish.)

A. It was around the first part of 1938.

Q. Will you state the circumstances under which you became a director of the Merchants Ice & Cold Storage Company?

A. I was invited by Mr. Arnold on behalf of the bondholders and trustee for the bondholders to take the position of [299] director, in order to represent the bondholders' interest in the Merchants Ice & Cold Storage Company.

Q. Is it a fact that just prior to your becoming a director of the Merchants Ice & Cold Storage Company it had gone through a reorganization proceeding?

A. That is my understanding.

Q. , And in the course of the reorganization proceeding it was agreed that the trustee for the bondholders would have the right to have representation on the board; is that right?

A. Yes.

Q. Were you selected as the representative on the board?

A. I was.

Q. Who was the trustee under the trust indenture at the time?

A. The Crocker National Bank.

Q. Who represented the bank in the directions and negotiations with you?

A. Mr. Sherman.

Q. And the Crocker First National Bank?

A. Yes.

Q. You were directed to represent the interests of the bondholders and the trustee under the trust

(Testimony of Will E. Morrish.)

indenture of the Merchants Ice & Cold Storage Company? A. I was.

Q. How long did you remain as such?

A. Until the early part of 1941.

Q. At the stockholders' meeting of 1941 you were not elected a director; is that right?

A. That is right.

Q. And that is when your relationship ceased?

A. Ceased.

Q. Now, during the period of time that you were a director on the board representing the interests of the bondholders and the trustee under the trust indenture, did you make it your business to look into the operations of the company and its properties and activities? A. Yes, I did.

Q. Will you state whether or not you kept a record of the operations of the company's affairs during that period of time [300] that you were on the board?

A. Yes. I was furnished with a statement of the company and I used to make a running record of those statements to see what position the company was in and see whether we were making progress.

Q. Did you examine and look into the maintenance of property? A. I did.

Q. Did you meet regularly with the board of directors? A. I met with the board.

Q. What was your position on the board?

A. Well, originally I was merely a director, but in 1940 I believe I was elected chairman of the board.

(Testimony of Will E. Morrish.)

Q. At the time that you became a director who was the president of the Merchants Ice & Cold Storage Company? A. Mr. Sherman.

Q. Did you have in the course of your being a director while he was president any act or occurrence in the management of the company under the presidency of Mr. Sherman which caused you to protest? A. Yes, I did.

Q. What did you find, Mr. Morrish?

A. I found that the company was being operated very inefficiently and that there were many questionable things going on in the company. It is rather difficult to name them all, because some of them were minor, but in general the company was not being run as it should be.

Q. At that time was Mr. Maffei a director on the board of directors? A. He was.

Q. Was Mr. Arnold a director?

A. He was.

Q. Was Mr. Maffei vice president of the company? A. He was.

Q. Now, were you drawing a salary during this period of time for your activities?

A. I drew \$100 a month up until the time I was made chairman of the board.

Q. Then what did you draw? A. \$200.

[301]

Q. \$200 a month? A. Yes.

Q. Did you devote much time to the concern?

A. I gave practically a day a week to it, half a

(Testimony of Will E. Morrish.)

day always, and then evenings with Mr. Arnold, and conversations at various times.

Q. Now, when Mr. Sherman died, will you state what happened in regard to the management of the Merchants Ice & Cold Storage—what changes took place?

A. Well, prior to the time that Mr. Sherman died he severed his relations with the company.

Q. Under what circumstances did he sever his relations with the company?

A. Under the pressure of the trustee, and Mr. Arnold and the board of directors.

Q. He was compelled to sever his relations?

A. Yes.

Q. And ceased being either a director or president of the company? A. Yes.

Q. When he ceased being a director and president there was a block of stock that was owned by William Sherman of the Merchants Ice & Cold Storage Company. Did you know anything about that, whether that was purchased by the holding company? A. No, only from hearsay.

Q. Now, Mr. Morrish, did you own any stock in the company yourself? A. No.

Q. You had no personal interest in the concern other than that you wanted to do your job for the trustee who had you on the board?

A. Yes. I did not own any stock.

Q. You were, of course, devoting practically all of your time to your other business activities, weren't you? A. Yes.

(Testimony of Will E. Morrish.)

Q. You were doing a good job on the board because you had been requested by the Crocker Bank; is that right? A. Yes.

Q. When Mr. Sherman ceased his connection with the company what, if anything, with relation to the management—what changes [302] took place? Tell us all the facts.

A. When Mr. Sherman ceased as president, Mr. Arnold had asked me at one time to become president of the corporation, and I told him at the time that I did not care to assume that responsibility, but later he insisted that I do that, and he was cooperating at the time and trying to clean up the company, and both the Crocker Bank and the bondholders thought that I should go in there as president. So I finally agreed with Mr. Arnold to do that. However, just prior to the directors' meeting in which that was to happen, Mr. Arnold told me that the Pacific Empire Corporation board had decided that he should go in as president.

Q. What did you do?

A. Then he suggested that I go in as chairman of the board. I went back to the Crocker Bank. I thought at first I should resign. I went back to the Crocker Bank and the Crocker Bank insisted that I stay on the board, and having undertaken the job I stayed with it.

Q. You stayed with it until February of 1941, is that right? A. That is right.

Q. Did you watch closely the operations of the company under the management of Mr. Arnold?

(Testimony of Will E. Morrish.)

A. I did.

Q. Will you state from the records that you got and from your examination of the financial reports and business operations of this company and your own activities in the company whether or not the company's financial condition improved during the year 1939 from the year 1938.

A. There was a general improvement in the condition of the company during those years.

Q. There was a gradual improvement; is that right? A. Yes.

Q. When did Mr. Bercut become a director of the Merchants Ice & Cold Storage Company, do you recall?

A. I think that—I am not positive about it, but it was during the time I was [303] made chairman of the board.

Q. During the year 1940 did you observe any retraction of the condition of the company, or did you observe any gradual improvement?

A. There was a temporary improvement under Mr. Arnold's management for a period of three or four months, and then it began to take the same trend as it had previously under Mr. Sherman.

Q. Now, Mr. Morrish, at this particular time, sometime during the year 1940, were you asked by Mr. Arnold to make a loan to Pacific Empire Holdings, Inc.? A. Yes, I was.

Q. How much was that loan?

A. He needed \$3,000.

(Testimony of Will E. Morrish.)

Q. Did you ask for some collateral?

A. I asked him for collateral.

Q. What collateral was given you for the loan?

A. He gave me stock of the Pacific Empire Holdings.

Q. Of the Merchants Ice & Cold Storage Company?

A. Merchants Ice & Cold Storage Company.

Q. How many shares of Merchants Ice & Cold Storage Company were pledged as security for that loan?

A. 1,500, I think.

Q. Of common? A. Common.

Q. Would you say that loan was adequately secured?

A. Yes.

Q. Would you say that a loan of \$2 a share on common stock was not a bad loan?

A. At that time, with the progress of the company, I felt that the security was adequate.

Q. Have you been paid the loan?

A. The company paid me \$200 and you as trustee, or whatever capacity you were acting in, paid me the balance.

Q. You returned the stock to the referee, did you?

A. I did.

Q. Will you please state, Mr. Morrish, from the records that you have kept in your own handwriting, as I have observed, [304] and from the financial reports of the company which you have examined, and from your own knowledge of the condition of this company what in your opinion

(Testimony of Will E. Morrish.)

was the reasonable, fair net worth of this company at the end of the year 1940, after making full allowance for all of its obligations and liabilities?

A. Well, I would have to refer to some figures that I have here.

Q. Will you please state to what you are referring?

A. As I stated, I have kept a running account of the comparison of the assets and liabilities of the company, and figured that the company in 1940 was making progress and that we were just on the verge of going into a period of very good times when it was sold. The figures that I have got down here were what I called distress figures, and figures that I believe that the company could have liquidated for.

Q. By the company you mean the Merchants Ice & Cold Storage Company?

A. The Merchants Ice & Cold Storage Company, yes. The assets as I wrote them down were \$1,576,000.

Q. At what time?

A. I reduced the land values down to \$700,000 as compared with the book value of \$865,000. I am just giving the regular figures, not the odd figures. The buildings I reduced from \$1,003,000 down to \$750,000, and the real estate—there was a small item of other real estate that I put in at \$20,000. The cash, of course, was, the accounts receivable, the same, because they had already set up a reserve

(Testimony of Will E. Morrish.)

for loss, and the bottles that they had for sale, which were later sold at \$7,500, giving me a total of \$1,576,000. That is a reduction in the assets as shown by the books of over \$400,000—between \$400,000 and \$450,000.

Now, on the liabilities side I figured the bonds had to be paid in full at \$659,500. There was an indebtedness to Pacific [305] Empire of \$9,500, which I included, and mortgage on other real estate of \$12,000; notes payable \$3,200; accounts payable, \$160,000, and a reserve for contingencies, \$15,000, or a total of \$859,000. Now, that left a net value or a knockdown value, as I expressed it, of \$716,000. I considered the preferred stock was probably worth its book value.

Q. That is \$10 a share?

A. \$10 a share.

Q. Par value, you mean by saying "book value"?

A. The par value, not the book value. That left in the neighborhood of \$300,000 value for the common stock.

Q. How many shares of common stock were there outstanding? A. 65,000-odd shares.

Q. How many shares of Merchants Ice & Cold Storage were outstanding? A. 107,000.

Q. 107,000? A. Yes.

Q. How much per share of common stock would you say there was reasonably behind the outstanding common as of December 31, 1940, upon the basis of your analysis?

(Testimony of Will E. Morrish.)

A. Well, basing the preferred at book, it left around \$2.80 a share value for the common.

Q. For the common? A. Yes.

Q. Now, Mr. Morrish, from your own knowledge of the condition and history of this company and the nature of its property and its maintenance of property and its business problems, would you say or have you formed any opinion with respect to whether or not the sale by Pacific Empire Holdings to Mr. Peter Bercut on or about January 8, 1941, of a block of stock in this company. Merchants Ice & Cold Storage Company, consisting of a little over 65,000 shares of common out of 107,000, and a little over 12,000 shares of preferred out of approximately 41,000 shares [306] outstanding for the sum of \$35,000 was a fair sale?

A. No, I think not.

Q. Have you formed any opinion as to what in your opinion was the reasonable value of that block of stock of 65,000 shares of common and 12,000 shares of preferred owned by Pacific Empire Holdings on or about January 8, 1941?

A. Well, I certainly think they should have been worth about \$200,000 to \$250,000, somewhere around there.

Q. At that time? A. Yes.

Q. In view of the fact that the company, as the exhibits now in evidence reflect, reported for the year 1941 a net profit, after allowing the sum of \$75,286.93 for depreciation,—still reported net profit

(Testimony of Will E. Morrish.)

of \$4,495.50 for 1941; and for the year ending December 31, 1942, after allowing the sum of \$77,124.68 as depreciation, reported a net profit of \$156,401.98, what in your opinion is the reasonable value of this block of stock on the basis of this improvement in business now being enjoyed by the company?

Mr. Naus: You mean at the present time?

Mr. Scampini: At the present time.

A. Well, in order to come to a conclusion on that I would have to take the statement and analyze it before I could give you a proper answer.

Q. I think that is fair. Would you say the value of that stock would be substantially higher than the value——

Mr. Naus: One moment. He has already told you.

Mr. Scampini: I will withdraw the question.

Q. Mr. Morrish, when did you first hear of the fact or learn of the fact that Pacific Empire Holdings had disposed of this block of stock?

A. Just prior to the annual meeting. [307]

Q. State under what circumstances you were advised.

A. Mr. Arnold came to me and told be he had decided that he had fooled around with the company long enough and that he was going to sell it to Mr. Bercut and that the price that he was going to get for it was \$45,000.

Mr. Naus: One moment. I understand you were

(Testimony of Will E. Morrish.)

calling for something said between him and Mr. Arnold, Mr. Bercut not being present, and I object to it as being hearsay and outside of the presence of the defendant Bercut.

Mr. Scampini: It is admissible against the defendant Arnold, your Honor. I think before the evidence is through it will be connected up with Mr. Bercut.

Mr. Naus: This is not admissible against the defendant Bercut.

The Court: I will allow it at this time subject to your motion to strike and over your objection. I understand that it is going to be connected up.

Mr. Naus: I will reserve my objection until the conclusion.

Mr. Scampini: Q. Will you continue?

A. —\$45,000 for one-half of the holdings of the Pacific Empire Holdings Corporation.

Q. What did you say to him?

A. I told him that I thought it was a steal at that price.

Q. Had you had occasion to see Mr. Arnold often during the period of time that you were associated with the Merchants Ice & Cold Storage Company? A. Quite often, yes.

Q. And for a period of five or six months prior to this discussion that you had with Mr. Arnold had he called upon you on some of his trips up to Sacramento?

(Testimony of Will E. Morrish.)

A. Yes, he had stopped [308] in once or twice at the bridge where I was located.

Q. Can you state approximately the time when he stopped the first time?

A. Well, I would say sometime in 1940.

Q. The middle part of the year? A. Yes.

Q. What, if anything, did he say to you when he stopped to see you?

A. Well, he told me he was on his way to discuss matters with Mr. Bercut.

Q. On his way where? A. At Sacramento.

Q. Did he say anything else to you with respect to his relationship with Mr Bercut?

Mr. Naus: One moment. Here is a supposed talk about another man. Mr. Bercut was not present, and I object to this.

The Court: I will allow it under the same ruling, namely, that it is going in over your objection subject to a motion to strike.

A. Mr. Arnold made the statement that he was doing some special work for Mr. Bercut, and he and Mr. Bercut were very close.

Mr. Scampini: Q. When was it that you were finally advised that this block of stock had been disposed of by Pacific Empire Holdings?

A. Not until after the title passed.

Q. Were you always under the assumption that they had only sold half of the stock?

A. I was.

(Testimony of Will E. Morrish.)

Q. Your assumption was based upon what Mr. Arnold told you; is that right? A. It was.

Q. Now, prior to February 15, 1941, did you attend a meeting at the Commercial Club at which meeting there were present Mr. Bercut and Mr. Arnold? A. I did.

Q. What was it, a luncheon meeting?

A. A luncheon meeting.

Q. Who got the meeting together?

A. Mr. Arnold.

Q. What was the purpose of the meeting?

A. Well, I did not [309] know Mr. Bercut very well, and Mr. Arnold wanted me to become better acquainted with him. Mr. Arnold thought I should remain on the board, and he handled this meeting with Mr. Bercut, I suppose, to get us a little better acquainted.

Q. Will you state to the best of your recollection what Mr. Bercut said at this meeting and what you said and what Mr. Arnold said?

A. Well, we talked of matters in general, and we finally discussed the matter of whether I was to remain on the board. And Mr. Bercut asked me to remain, and I agreed at that time and we shook hands on it, that I would remain on the board, but prior to accepting that I had again gone to the trust company and asked them if they wished me to remain on it. I would have preferred to have gotten off, but they still insisted that I stay on.

Q. Now, at this meeting was anything said with

(Testimony of Will E. Morrish.)

respect to acquiring stock and bonds of the company?

A. Well, Mr. Bercut made the suggestion, or it was discussed, that the company was going ahead, and there was some money to be made in the purchase of stocks and bonds.

Q. What did you say?

A. I don't remember what the answer was. I was simply sitting there.

Q. Who made the suggestion?

A. Mr. Bercut.

Q. On February 15, 1941, then you ceased being connected with the company, is that right?

A. Yes.

Q. Do you know whether or not toward the latter part of 1940 there were indications leading you to believe that the company was about to enter upon a period of increased business activity?

A. The prospects for the coming year were very good at that time.

Q. What was the condition of the laundry company at the Pacific National Bank at that time, if you know?

A. I could only give [310] you that from hearsay.

Q. Were you advised of any pressure on the part of the bank?

A. Not from the Pacific National Bank. I was in there constantly, but I had never been approached by the bank on account of their loan.

(Testimony of Will E. Morrish.)

Q. Were there any special problems that were pressing in the company at this time?

A. I think there was one matter in regard to a loss on some trust receipts. That was quite a problem.

Q. Was that a matter which in your opinion involved the solvency of the company?

A. No.

Q. Was the matter which occurred in the normal course of operation of business of that company?

A. It was rather a large loss, but it is one of those things that happen in your business.

Q. This concern, the Merchants Ice & Cold Storage Company, is quite an old concern, is it not? A. I think it has a long record.

Q. It goes back to 1890, doesn't it?

A. Yes.

Q. It enjoys quite a high percentage of the cold storage business of the Bay counties, does it not?

A. Yes.

Q. Is it favorably located? A. Very.

Q. On the Embarcadero? A. Yes.

Q. Well supplied with spur tracks and shipping facilities? A. Yes.

Q. In your opinion were the prospects of that company in the future good or bad at the end of 1940? A. Good.

Mr. Scampini: You may take the witness.

(Testimony of Will E. Morrish.)

Cross Examination

Mr. Naus: Q. I agree with you, Mr. Morrish, that it is a pretty old concern, and you seem to be more or less familiar with [311] it. Would you tell me, please, the last year before the beginning of the year 1941 in which the result of the operations of the Merchants Ice & Cold Storage Company showed a profit for the year rather than a loss?

A. I will ask you to repeat that.

Mr. Naus: Will you repeat the question?

(Question read.)

A. I still do not understand the question.

Q. Well, I will break it down to simply this: You run the business; let us assume you run the calendar year business, you close the business; at the end of the year, then, your operations either show a loss or a profit, don't they? A. Yes.

Q. That, I assume, is what was done at the Merchants Ice & Cold Storage Company. Now, what I want *to is*, going backward from January 1, 1941, and searching through the records of the Merchants Ice & Cold Storage Company throughout the years, what was the last year before January 1, 1941, in which the operations of the Merchants Ice & Cold Storage Company resulted in a profit for the year rather than a loss for the year?

A. I did not see the 1940 statement. To my recollection, the last statement that I had was the 1939 statement.

Q. Well, would you still answer the question: So

(Testimony of Will E. Morrish.)

far as you know, based upon these various positions—you were director and chairman of the board and you were trustee of the bondholders, and the like—what was the last year before January 1, 1941, so far as you have any knowledge, in which the operations of the Merchants Ice & Cold Storage Company showed a profit for the year rather than a loss for the year?

A. It showed a loss each year for the two years that I was associated with it. [312]

Q. That still does not quite meet the question. Can you tell me the last year before January 1, 1941, in which the Merchants Ice & Cold Storage Company was ever operated at a profit rather than at a loss? A. No, I could not say.

Q. Can you tell me whether or not the aggregate loss from the operation of the Merchants Ice & Cold Storage Company for ten consecutive calendar years ending December 31, 1940, aggregated a loss for those ten years exceeding \$10,000,000?

A. I never figured what the aggregate loss was except as I saw it on the statements.

Q. As you sit there on the stand and after all of the connections you have had with Merchants Ice & Cold Storage Company and from any investigation you have made or from any accounting analysis you have ever made, can you tell me one year before January 1, 1941, in which Merchants Ice & Cold Storage Company was operated at a profit for the year?

(Testimony of Will E. Morrish.)

A. I could not answer.

Q. Now, you have referred to some notes of some sort when you testified. Will you be good enough to let me see them, please, whatever you testified from?

A. Yes.

Q. Is that entirely all that you referred to?

A. Yes.

Mr. Naus: May I examine it a moment, your Honor?

The Court: Yes.

Mr. Naus: Q. When did you prepare this, Mr. Morrish?

A. I took that off of some figures here I prepared in 1939. I took that off the statement that I kept, a running record of the statement I had issued by the public accountant. I did that about a month ago.

Q. This paper that I hold in my hand was written by you at one sitting about a month ago?

A. This is the only record that [313] I have kept. I have destroyed all of the records that I kept with this one exception, and when I was subpoenaed I got this paper up.

Mr. Naus: May I have this first paper that has been in my hands so far marked for identification, if your Honor please?

The Court: It may be.

(The paper was marked "Defendants' Exhibit E for Identification.")

(Testimony of Will E. Morrish.)

DEFENDANTS' EXHIBIT E

MERCHANTS ICE

Dec. 31, 1939

Assets

	Book	My Val.
Land	\$ 86,608.55	\$ 700,000.00
Building	1,003,302.97	750,000.00
Real Est.	27,992.42	20,000.00
Cash	6,415.57	6,415.57
Accts. Rec.	92,144.40	92,144.40
Bottles	7,500.00	7,500.00
	<hr/>	<hr/>
	2,002,963.91	1,576,059.97

Difference between book and my appraisal..... \$426,903.94

This leaves out the following:

Inv. in Sec.....	26,437.40
Due from Globe.....	23,874.94
Def. Charges	59,772.25

Liabilities

Bonds	\$ 659,500.00
Pac. Empire	9,585.27
Mtge. Other	
Real Est.	12,100.00
Notes Pay.	3,258.42
Accts. Rec. Pay.	160,383.27
Reserve Conting.	15,000.00
	<hr/>
	859,826.96

My valuation assets.....\$1,576,059.97
All liabilities 859,826.96

Net value	716,233.01
Preferred Stock at book.....	416,150.00
	<hr/>
Balance for Com. Stock.....	300,083.01

(Testimony of Will E. Morrish.)

Common Stock outstanding:

107,118 shares. Taking my value of assets, $300083 \div 107118$
or 2.80 per share.

Value of Pac. Empire Holding sold to Bercut:

12,000 shares Preferred @ \$10	120,000
65,000 shares Common @ \$28	184,000

Total value	304,000
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Sold for \$35,000.

Should add some value for control.

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No.
22339R. Defts. Ex. No. E Ident. Filed.....
Walter B. Maling, Clerk.

Mr. Naus: Q. The clerk has now marked that first paper Defendants' Exhibit E for identification. With that in mind, Mr. Morrish, would you now hand me any and all papers that you have here from which you compiled this as a summary?

A. I have not got the statement here. That is where I got it. I had the annual statement prepared by the auditor; that is where I took those figures from.

Q. Perhaps I can clear that up. You had before you one or more annual statements when you prepared that? A. No, I had one only.

Q. For what year? A. 1939.

Q. You had the Forbes report for the calendar year December 31, 1939. Does that identify it?

A. Yes, but I had my own figures here.

(Testimony of Will E. Morrish.)

Q. Will you now hand me those two sheets, adding the above report mentioned, comprising the basis of the summary that is now Defendants' Exhibit E for identification?

A. You mean these, plus my recollection?

Q. I just want the papers, please.

Mr. Naus: May I have these marked for identification, your Honor?

The Court: Yes. [314]

(The papers were marked "Defendants' Exhibit F for Identification.")

(Testimony of Will E. Morrish.)

DEFENDANTS' EXHIBIT F
MERCHANTS ICE & COLD STORAGE CO.

	1939					1940								
	July 31	Aug. 31	Sept. 30	Oct. 31	Nov.	Dec.	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.
Assets														
Property.....	1,974,159.98	1,974,159.98	1,974,159.98	1,974,716.18		1,976,108.68	1,898,334.12	1,900,561.79	1,901,510.10	1,902,382.62	1,903,793.01	1,909,161.41		1,914,080.26
Securities.....	26,437.40	26,437.40	26,437.40	26,437.40		37,137.40	46,302.62	46,302.62	46,302.62	45,302.62	45,302.62	42,309.82		39,938.56
Cash.....	2,002.21	5,112.56	3,890.49	3,305.68		6,317.47	4,070.11	2,331.37	4,156.18	1,773.60	2,946.49	2,723.14		2,010.97
Notes, Acct. Receivable.....	102,081.94	146,244.92	129,364.10	123,631.57		119,933.43	107,315.78	105,428.81	84,556.27	92,122.86	101,470.91	102,046.74		156,545.21
Deferred Charges.....	82,453.61	80,092.21	79,770.01	83,995.67		65,010.31	58,284.41	61,100.73	60,332.27	59,682.29	60,129.43	48,682.42		48,428.40
Total.....	2,187,135.14	2,242,167.84	2,209,731.49	2,208,780.82		2,204,507.29	2,114,307.04	2,115,725.52	2,096,857.44	2,101,263.99	2,113,642.46	2,104,923.53		2,161,003.40
Liabilities:														
Capital Stock.....	1,415,725.00	1,415,725.00	1,415,725.00	1,415,725.00		1,415,725.00	1,415,725.00	1,415,725.00	1,415,725.00	1,415,725.00	1,415,725.00	1,415,725.00		1,415,725.00
Mortgage Bonds.....	659,500.00	659,500.00	659,500.00	659,500.00		659,500.00	659,500.00	659,500.00	659,500.00	659,500.00	659,500.00	659,500.00		659,500.00
Mortgage Payable.....	12,600.00	12,500.00	12,400.00	12,400.00		12,100.00	12,100.00	12,000.00	12,000.00	11,900.00	11,800.00	11,700.00		11,500.00
Loans, Stockholders, Others.....	37,669.66	35,312.80	31,021.71	30,667.21		26,095.40	20,981.42	16,170.96	11,503.54	29,546.72	24,354.13	20,836.96		13,460.71
Current Liabilities.....	175,068.27	188,335.49	164,979.96	158,707.18		144,734.96	152,432.62	157,529.61	143,308.80	129,435.28	148,055.17	144,397.48	†	
Notes to Banks, Sec.....	91,359.23	97,954.14	92,485.72	82,679.41		62,148.15	65,164.31	64,569.00	43,522.26	45,160.80	70,897.10	74,445.35		95,299.19
Notes and Contracts Payable.....	7,366.33	6,120.21	5,125.47	3,697.04		9,104.20	8,505.43	7,487.34	8,347.88	7,647.64	6,614.97	9,615.41		11,191.26
Acct. Payable Trade.....	22,305.36	23,351.68	22,979.91	23,024.37		10,171.59	16,210.57	21,042.29	20,738.96	22,387.98	23,014.32	22,182.45		27,861.17
Income Tax.....	6,029.90	6,029.90	5,779.90	5,779.90	Inst.	9,347.69	6,811.67	6,811.67	6,811.67	6,811.67	5,612.03	5,162.09		1,963.59
						6,252.40								
Property Taxes.....	22,555.91	29,255.91	25,955.91	27,655.91		22,308.69	24,997.83	26,697.83	28,397.83	30,097.83	23,153.48	12,372.20		
State Unemploy. Reserve.....	5,905.86	6,829.87	7,150.85	6,908.42		8,174.64	8,050.93	6,620.57	7,366.60	8,140.97	7,757.45	5,137.45		4,780.36
Accrued Wages.....	2,789.99	3,509.08	3,141.35	3,103.25		2,385.71	3,351.83	2,010.05	2,823.95	1,825.19	1,042.37	2,081.38		8,006.72
Purchase Pref. Stock.....	1,225.00	1,175.00	1,125.00	1,075.00		975.00	925.00	875.00	825.00	750.00	750.00	—		750.00
				1,102.62}										
Accrued Int.....	15,451.52	19,030.53	1,156.68	3,572.29}		13,782.84	14,289.16}	19,854.92	23,413.71	5,552.26	7,144.55	10,716.84		17,861.45
							2,064.95}				88.93	1,934.31		1,934.11
Other Accts. Pay.....	79.17	79.17	79.17	79.17		84.05	2,060.94	1,560.94	1,060.94	1,060.94	—	—		—
Deferred Credit.....	200.00	200.00	200.00	200.00		200.00	—	—	—	—	—	—		—
Reserve for Contingencies.....	15,000.00	15,000.00	15,000.00	15,000.00		15,000.00	15,000.00	15,000.00	15,000.00	15,000.00	15,000.00	15,000.00		15,000.00
Surplus.....	128,627.79	94,526.22	89,095.18	83,418.57	—	68,848.07	161,432.00	160,200.05	160,179.90	159,843.01	160,791.84*	162,235.91*		128,930.22*
Total.....	2,187,135.14	2,242,167.84	2,209,731.49	2,208,780.82		2,204,507.29	2,114,307.04	2,115,307.04	2,096,857.44	2,101,263.99	2,113,642.46	2,104,923.53		2,161,003.40

*Denotes red figures.

†Illegible.

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22339R. Deft's Ex. No. F Ident. Filed Walter B. Maling, Clerk.

(Testimony of Will E. Morrish.)

Mr. Naus: Q. Now, that Defendants' Exhibit F for identification, that has been drawn up from the books of the secretary of the company, has it not?

A. That was drawn up from the monthly report that was furnished to me by Mr. Arnold.

The Court: For the purpose of the record, identify it.

Mr. Naus: Q. I show you, Mr. Morrish, Defendants' Exhibit F for identification. Will you describe that to his Honor, please.

A. That is the comparative report that I took care of personally from the monthly statement that was issued to me by Mr. Arnold.

The Court: Q. During the months of 1939?

A. It runs from July 31, 1939 to August, 1940.

Mr. Naus: Q. Would this be a fair statement: You took the type of statement that the annual statement is, but instead of making it for a whole year, making it month for month, and then had a monthly statement instead of an annual statement. It is the same type of statement?

A. It is the same type of statement, but it is a month-to-month picture of it.

Q. Referring to Defendants' Exhibit E for identification, in looking at that I take it that is what you gave your testimony from with respect to values and figures?

A. That is right.

Q. In your judgment? A. Yes.

Q. That is as of what date?

A. About thirty days ago.

(Testimony of Will E. Morrish.)

Q. I understand, but values as of what date?

A. That was taken off of the December 31, 1939, statement.

Q. Might I ask this: Was the purpose of this to arrive at your personal opinion of the value as of December 31, 1939?

A. It was to check my personal opinion of the value that I had [315] expressed to Mr. Arnold at the time.

Q. Just to simplify it, this Defendants' Exhibit E for identification purports to show a valuation as of what date?

A. As of December 31, 1939.

Q. Now, you have written the value of the land below what it was carried on the books?

A. Yes.

Q. That is because in your opinion the land was not worth what it was shown on the books to be worth?

A. I think I testified that this was a knockdown value that I was giving in case of liquidation.

Q. I will repeat my question: Isn't it the fact that on Defendants' Exhibit E for identification you put the value of the land below what is shown on the books because in your opinion it was not worth what it was shown on the books to be worth?

A. I think it is worth a whole lot more than that now.

Q. As of December 31, 1939, did you put this value down below what is shown on the books be-

(Testimony of Will E. Morrish.)

cause it was not, in your opinion, worth what it was shown on the books?

A. Only as a knockdown value.

Q. A liquidating value, is that it?

A. That is right.

Q. Now, you have written the value of the buildings down roughly a quarter of a million below what the books show, haven't you? A. Yes.

Q. A quarter of a million below what the books show the depreciated value of the buildings to be?

A. Yes.

Q. And after going through these calculations you end up with an asset value of roughly \$1,596,000? A. Yes.

Q. Is that right? A. Yes.

Q. Then according to your answers to Mr. Scampini as to the value of the common stock per share, you reached that figure—what [316] was it?

The Court: \$2.80.

Mr. Naus: Q. \$2.80. Do you have that in mind?

A. Yes.

Q. You reached that by a method of calculation of what you deemed to be the liquidating value of the assets minus liabilities and then divided that by a certain number of shares?

A. That is correct.

Q. Is that the method?

A. That is right.

Q. Is that the way you got this? A. Yes.

Q. Now, in doing that you took \$1,500,000 of

(Testimony of Will E. Morrish.)

assets and then subtracted, of course, the bond issue of \$659,500? A. Yes.

Q. And then you subtracted further liabilities?

A. Yes.

Q. Now tell me actual amount of payables you deducted under the head of liabilities other than the bond issue, or if you have not added it up I can do it.

A. On just a quick computation here it shows about \$203,000.

Q. \$203,000 payables over and above the bond issue? A. Yes.

Q. Then you subtract what for the liquidating value assignable to the preferred shares before reaching a value for common?

A. I valued the preferred stock on the book at \$10.

Q. Well, now, you say "the book." The preferred had a par of \$10 a share, didn't it?

A. Yes.

Q. And there were 41,615 shares outstanding, weren't there? A. Yes.

Q. So you assigned to the preferred \$416,150, is that correct? A. That is right.

Q. You know it is cumulative preferred, don't you? A. I do.

Q. Cumulative as to dividends and as to priority in the assets? A. Yes.

Q. It was seven per cent cumulative preferred, was it not? [317] A. I think so.

(Testimony of Will E. Morrish.)

Q. It has paid no dividends since 1927, has it?

A. I could not state the date.

Q. You would have to know the date before you could arrive at the liquidating value of the common, wouldn't you?

A. I don't remember the date.

Mr. Naus: There is no question that it was 1927, is there?

Mr. Scampini: I will stipulate there is about \$10 of accumulated dividends; is that correct?

Mr. Naus: Roughly.

Q. Mr. Scampini and I have agreed, because there is no question, that there has been no dividend on the preferred since 1927. So, at the time of this deal here there were fourteen years' cumulative seven per cent dividend, and 7 times 14 is 98 per cent. There is no question about that. So wouldn't there be \$19.80 a share, roughly \$20 a share, that had to be assigned to that preferred instead of \$10 before you reached the value for the common stock?

A. Well, if it was a going concern, but I have based all of my figures on the liquidating value.

Q. Either as a going concern or as a liquidating concern the articles of incorporation that we have in evidence show that the preferred has the priority on liquidation, so it has a preference either way, can't you see, Mr. Morrish? So that instead of assigning \$10 a share to the preferred you must assign \$19.80 to the preferred as of the time of the deal in

(Testimony of Will E. Morrish.)

figuring out the liquidating value of the common stock.

Mr. Scampini: I will stipulate to that.

Mr. Naus: Just a moment, please.

A. That is right.

Q. Then can't you see, Mr. Morrish, instead of the common stock [318] having a liquidating value of \$2.80 at the time of this sale, it was worthless at the time of the sale?

A. The value was still there in the preferred stock owned by the Pacific Empire.

Q. Might I return to my question, and I am only pursuing it because on direct you said the value of \$2.80, liquidating value for the common. I want to test that. So I repeat my question. Can you now not see that if you use that method that at the time of the purchase deal the common stock was worthless?

A. No, I do not think it was worthless, because the company had had a long period of service in the community. It was entering into a period of good business, and there is always in addition to that a very substantial value placed on the control of any corporation.

Q. Is it or not the fact that using your method with respect to arriving at the liquidating value of the common stock, that at the time of the purchase deal the common stock was worthless?

A. I expressed myself that it was not worthless.

Q. I am speaking now for the purpose of liquidating. I will return to the future presently.

(Testimony of Will E. Morrish.)

A. I do not understand what you are driving at with regard to liquidation.

Q. I am only trying to follow up your suggestion of the liquidating value, Mr. Morrish. You took on direct examination what you call the liquidating value, the assets, the liabilities, this, that and the other thing to arrive at a value of \$2.80 per share of the common stock. Now, assuming that at the time of the purchase deal that instead of continuing in business the Merchants Ice & Cold Storage Company was liquidated out, and taking your value, isn't it a fact that at that time the common stock was worthless?

A. You mean if it was sold parcel by parcel, or if somebody came in and offered a price for it?

[319]

Q. I mean whatever you had in mind, Mr. Morrish, when in speaking of liquidating value on everything you assigning to the assets the value that you did.

A. I had in mind the sale, and I have testified to the value that I believe that the stock was worth on the liquidating sale.

Q. But now, as I have pointed out to you, on your direct examination you have only assigned \$10 a share to the preferred, and since I have provided you with additional information as to which there is no dispute between me and counsel, you must assign \$19.80 to preferred instead of \$10; that using your method, but correcting the figure as to pre-

(Testimony of Will E. Morrish.)

ferred, that that means on the liquidating value the common stock was worthless; isn't that the fact?

A. I have not figured that out.

Q. Would you do so, please, or can't we do it this way, by a question. Let me reframe it. Using your method of \$10 a share you finally end up with some figure of some \$200,000-odd and you divide 107,000 shares of common into that, don't you?

A. Well, if you value the preferred at \$20 a share there would be nothing left for the common stock; that is right.

Q. Well, now, let us take a further step. There would be nothing left for the common stock, and isn't it a fact that if you assign \$19.80 to the preferred there would not be enough to pay out the preferred in full?

A. No, I disagree with that.

Q. There are 41,615 shares. A. Yes.

Q. Now, assigning \$20 a share to that would be assigning \$832,300 to the preferred, wouldn't it?

A. Yes.

Q. There is not that much there, is there, after subtracting the bonds and notes and otherwise?

A. No, but in the settlement or liquidation there would have been a great many deductions that we could have made in these liabilities, and I [320] base this whole thing on liquidating value, and there would be value, in my judgment, enough to pay the preferred stockholders.

Q. Let me see if I understand that. Do you not

(Testimony of Will E. Morrish.)

mean by that that in order to pay out to preferred stockholders \$19.80 you would have to settle with your creditors or your notes payable creditors, your accounts payable creditors, at something less than a hundred per cent on the dollar?

A. I have deducted around \$450,000 from the assets as an allowance for those very things that you are now asking about.

Q. But to return to my question, I would like to see if I can get a direct answer to it. Is it not a fact that when you answered a while ago that in order to pay out even the preferred at a value of \$19.80 a share that you would have to pay your notes payable creditors, your account payable creditors, something less than 100 cents on the dollar in order to accomplish that?

A. You would have to do that if the value of the \$450,000 in question that I made to cover that was not included, yes.

Q. Well, now, was there ever any time prior to January 1, 1941, any time that you know of when any balance sheet of the Merchants Ice & Cold Storage Company could be looked at and from it be seen that the current assets amounted to more than the current liabilities; or to put it differently: So far as you know, isn't it the fact that the current liabilities position of Merchants Ice & Cold Storage Company has always been greater than its current assets position?

(Testimony of Will E. Morrish.)

A. For the two years I was there I believe that to be true.

Q. As you sit there now, you don't know of any year before January 1, 1940, in which it was not true?

A. I did not examine back beyond that time.

[321]

Q. Then you don't know, do you? A. No.

Q. That is not a healthy condition for a company, is it?

A. No, but the company was making improvement constantly in its credit position due to the fact that the depreciation was charged off each year. We were eliminating many of our accounts payable, old bills, that had been outstanding, and on the basis of the depreciation each year that company would have paid its accounts payable in the period of two years.

Q. All right, let me see if I understand that. You say, then, do you not, that the cash position of Merchants Ice & Cold Storage Company during the period that you were familiar with it depended upon the amount of depreciation written off each year? I will put it this way: The Merchants Ice & Cold Storage Company——

The Court: The testimony is that it was improving its position because of that write-off.

The Witness: Yes.

Mr. Naus: Improving its cash position.

The Court: Yes.

(Testimony of Will E. Morrish.)

Mr. Naus: Q. In other words, you were writing off \$72,000 or \$73,000 or thereabouts for depreciation? A. Yes.

Q. And that was the proper write-off, was it not? A. That is right.

Q. That was because the plant was wearing at that rate, was it not?

A. That is substantially so, but during the two years that I was there, there were a great many thousands of dollars put into the plant to keep it up to date, and in fact it was much improved during the two years rather than depreciated.

Q. Well, to come back to my question, depreciation is proper [322] to write off because of wearing of the plant; that is all there is to it, isn't it?

A. Yes.

Q. Take a year in which after depreciation the company broke just even, didn't make a dollar and didn't lose a dollar, then in such a situation the Merchants Ice & Cold Storage, while it neither lost nor made a dollar, would have available in cash say \$72,000 that would be depreciation write-off, wouldn't it? A. Yes.

Q. So your expectation of improvement in cash position came about simply during the wearing out of the plant?

A. I do not mean to say that they had that amount of cash on hand, because that cash was being used to pay off the liabilities.

Q. Now, you spoke as of the end of 1939, I think

(Testimony of Will E. Morrish.)

it was, or was it the end of 1940, about your expectation of improved business—were you speaking of 1940, at the end of 1940? A. Yes.

Q. You based that assumption upon what?

A. I based the assumption that the year 1941 was going to be a better year than 1940, an assumption that I used in the study of conditions all of the time; that is my business, to study conditions.

Q. Was that improvement of business due to your expectation of increased demands by the Government by reason of the adoption of the Selective Service Law? A. Yes.

Q. It was before Pearl Harbor? A. Yes.

Q. Was it based, then, on the transitory condition, so far as you could forecast?

A. I do not quite understand that last.

Q. What I mean to say by that is, Did you base it upon what now [323] would be called war conditions, or as of the early part of 1941, which would be the date of the draft law and the increased demands of the Government? You as a business man would look upon that as probably a transitory period, inasmuch as we hope the war will end at some time.

A. Yes, but our general position was improving in addition to that.

Q. In the two years that you were there and to which you are addressing your testimony, what was the aggregate for each of those years of the gross

(Testimony of Will E. Morrish.)

sales or gross revenue of the Merchants Ice & Cold Storage Company?

A. I have not those figures before me.

The Court: If you have them available, get them.

Mr. Naus: Q. You have what two years—1939 and 1940?

A. Yes.

Q. According to the books, records, etc., the aggregate gross sales or gross revenue from storage, ice and the like for 1939 was in reported figures \$386,000 and for 1940 \$371,000. Do you have that in mind now?

A. I do not remember the figures, but I remember that 1940 was a little less than 1939 due to a very peculiar condition that existed in regard to the pear crop.

Q. Well, all I know about the figures is what we get from the audit report and the books, about which we have no controversy here, Mr. Morrish. Now, what did you forecast the gross business of 1941 was likely to be at the time of the Bercut deal?

A. I never made any forecast, in figures.

Q. Well, as to whether the business was going to continue for long years, or losses in a year or two or profit—doesn't that depend largely upon the amount of increased business they are going to do?

A. Yes.

Q. And particularly in this type of business

(Testimony of Will E. Morrish.)

where the rates [324] are regulated by a public body? A. Yes.

Q. Making your forecast for 1941, what did you think it was going to do by way of operating results for the year 1941? What did you have in mind at the time of the Bercut deal in January, 1941, that the company was likely to do for the year 1941?

A. I did not give any consideration to it at that time. My ideas on that were formed in the latter part of 1940 when we were supposed to continue as we had in 1941.

Q. At the end of 1940 did you expect the company to have another year end in a loss or end in some profit? A. At the end of 1940?

Q. At the end of 1940 did you figure 1941 would end up with a loss or some profit?

A. With a profit.

Q. How much did you anticipate?

A. That would be guessing.

Q. Well, I agree with you there, but apparently your estimated value was based on some guessing. What at the end of 1940 did you guess as to 1941?

A. It was pretty generally agreed by Mr. Arnold and myself during the latter part of 1940, with our several new accounts, that we had on the books, and with the prospect for the fruit situation, etc., we would have a much better year in 1941.

Q. You spoke of there not being pressure from the Pacific National Bank. Can you or not as a former director and chairman of the board tell me

(Testimony of Will E. Morrish.)

whether or not during 1940 the notes payable to the Pacific National Bank were secured by a pledge of accounts receivable of the Merchants Ice & Cold Storage Company?

A. Some of them were, yes. You are talking of the Merchants Ice & Cold Storage Company?

Q. Yes. A. Yes.

Q. Can you or not tell me whether during 1940 there was a pledge [325] of what was known as the ice contract, that is to say, all of the monies to be received for a year thereafter from the production of ice?

A. What do you mean, a pledge to the bank?

Q. Yes. A. I can't answer that.

Q. At the end of 1940 do you know what the current liabilities position of the Merchants Ice & Cold Storage was?

A. I could not tell you unless I had the figures.

Mr. Naus: I do not think we have put in that balance sheet. I have that.

Mr. Scampini: You can put it in now.

Mr. Naus: I offer the balance sheet of Merchants Ice & Cold Storage Company as of December 31, 1940.

The Court: It may be admitted and marked.

(The balance sheet was marked "Defendants' Exhibit G.")

(Testimony of Will E. Morrish.)

DEFENDANTS' EXHIBIT G

Merchants Ice & Cold Storage Company

BALANCE SHEET AS OF DECEMBER 31, 1940

Assets		Month of December
Plant, Property and Equipment:		
Land	\$	865,608.55
Buildings, machinery and equipment.....		2,284,365.54
Less reserve for depreciation.....		1,336,625.18
		<hr/>
		947,740.36
Plant property and equipment.....		1,813,348.91
		<hr/>
Acme Ice Cream Co.:		
Land and Buildings.....		28,185.53
		<hr/>
Investments in Securities.....		26,437.40
		<hr/>
Current Assets:		
Cash		2,918.93
Notes receivable		13,604.15
Accounts receivable		134,219.78
		<hr/>
		150,742.86
Less reserve for doubtful accounts.....		26,500.00
		<hr/>
Total Current Assets.....		124,242.86
		<hr/>
Due from Globe Brewing Co.....		27,995.68
Less reserve		15,000.00
		<hr/>
Total Due from Globe Brewing Co.....		12,995.68
		<hr/>

(Testimony of Will E. Morrish.)

Deferred Charges:

Unamortized bond discount and expense.....	\$ 28,230.76
Commission on sale of Preferred stock.....	11,063.57
Prepaid taxes	11,443.60
Prepaid insurance	3,576.67

Total Deferred Charges.....	54,314.60
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Total	2,059,524.98
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Liabilities

	Month of December
First Mortgage 6½% Serial Gold Bonds.....	\$ 659,500.00
Mortgage Payable Other Property.....	11,300.00

Current Liabilities:

Notes payable, banks.....	98,199.58
Notes payable, other.....	5,771.89
Contracts payable	1,090.00
Accounts payable	30,462.24
Taxes payable, City and County.....	25,704.73
Accrued unemployment reserve for payroll taxes	4,271.54
Accrued Social Security taxes.....	656.74
Accrued wages	3,958.34
Accrued bond interest.....	10,716.87
Accrued interest payable.....	2,331.99
Accrued Federal Income Taxes.....	1,912.50
Federal Income Tax assessment.....	1,713.59
Due on repurchase agreement for our own Preferred Capital stock.....	750.00

Total Current Liabilities.....	187,540.01
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Rent Received in Advance.....	2,048.47
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(Testimony of Will E. Morrish.)

Capital Stock:

Preferred 7% Cumulative 41,615 shares	
outstanding	\$ 416,150.00
Common stock without par value, 107,180	
shares outstanding	999,575.00
	<hr/>
Total Capital Stock.....	1,415,725.00
	<hr/>
Surplus as of March 31, 1940.....	216,588.50*
	<hr/>
Total	2,059,524.98
	<hr/>

*Denotes red figures.

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22339R. Defts. Ex. No. G. Filed 5-6-43. Walter B. Maling, Clerk. By J. P. Welsh, Deputy Clerk.

Mr. Naus: Q. I show you Defendants' Exhibit G and ask you to accept that as the balance sheet of the Merchants Ice & Cold Storage Company as of December 31, 1940, because I do not think there is any controversy between the parties that it is. Now, looking at that balance sheet as of December 31, 1940, when you look at the current liabilities as against current assets, wasn't the Merchants Ice & Cold Storage Company a little bit sick?

Mr. Scampini: We will stipulate it was a little bit sick. It had a cold.

Mr. Naus: Will you stipulate it was quite sick?

The Court: Will take a recess and let the witness have an opportunity to look it over.

(After recess:)

(Testimony of Will E. Morrish.)

Mr. Naus: Q. Before recess, Mr. Morrish, we were talking with respect to the condition of the health of the Merchants Ice [326] & Cold Storage Company at the end of 1940. Having in mind its current liabilities position and current assets position, what can you tell us about that now?

A. I have never seen this statement before, but reading from the statement, the total current assets are \$124,000 and the total current liabilities are \$187,000, but that is not in my judgment a bad condition, because many a company that has been in that condition has been able to work out of it easy.

Q. It is generally worked out by getting more cash, isn't it?

A. The difference between them is \$62,063 and one year of depreciation converted into cash for that year would have taken care of it.

Q. Would you expect the creditors to wait for a year's depreciation before they were paid?

A. Many of these liabilities could have been carried on.

Q. Now, how much cash did it have on hand on December 31, 1940? A. \$2,900.

Q. Did it or not have some \$20,000 of taxes delinquent about that time?

A. Well, I couldn't answer that.

Q. Can you or not tell me whether or not in March, 1941, some \$21,000-odd under the bond indenture would have to be deposited to pay the interest on the bonds?

(Testimony of Will E. Morrish.)

A. Well, there were bond requirements each year to be paid.

Q. Where, as of December 31, 1940, with the current liabilities one and a half times the assets, was the \$21,000 of cash coming from to pay the interest early in 1941?

A. Well, this statement is as of December 31, 1940, and you said these bond requirements were in March or April.

Q. I think in April, but they were required to be placed in the hands of the trustee thirty days ahead.

A. They had [327] accounts receivable of \$134,000 and they only owed—I don't know from the statement; I could not say how much they owed on accounts receivable.

Q. You know, don't you, that the accounts receivable, the majority of them, all that were of any consequence were already soaked with the Pacific National Bank?

A. No, it does not show that. It shows that the notes payable at the bank were around \$98,000, and there might have been, as you suggested this morning, a contract of collateral on that loan.

Q. Can you or not tell me whether as of December 31, 1940, the Merchants Ice & Cold Storage Company was getting in fairly desperate need for cash to continue in business?

A. Yes, they needed cash.

Q. I will repeat my question: Can you or not

(Testimony of Will E. Morrish.)

tell me whether or not at the end of 1940 they were desperately in need of a substantial amount of cash?

A. Not any more than they had been in the past.

Q. You mean it was rather customary or habitual for the Merchants Ice & Cold Storage Company to be in desperate need of ready cash?

A. They were always short of cash.

Q. Now, this loss that you spoke of in 1940, that was with Bennett & Layton, was it not?

A. I believe it was.

Q. You spoke of trust receipts; you meant warehouse receipts, didn't you. I understood your direct examination to state trust receipts, but you meant warehouse receipts?

A. Yes.

Q. I just wanted to clear it up. Those were negotiable warehouse receipts which the Merchants Ice & Cold Storage Company, what might be called a public warehouse, put out to the public?

A. Yes.

Q. The loss that you speak of was that the Bank of America was [328] claiming approximately \$40,000 from the Merchants Ice & Cold Storage Company because it as an innocent holder of value to the extent of \$40,000 had put out money on Merchants Ice & Cold Storage butter receipts, but it turned out there was no butter; is that what you mean?

A. I think that is right.

Mr. Naus: I think that is all.

(Testimony of Will E. Morrish.)

Redirect Examination

Mr. Scampini: Q. Have you had an opportunity since the recess to examine the statements of Merchants Ice & Cold Storage Company for the years not only of 1940 but 1941 and 1942?

A. Yes, I looked at them during the recess.

Q. Have you as a result of your study of those operating statements and also the balance sheets for those two years 1941 and 1942 arrived at any opinion with respect to whether or not the reasonable value of the block of shares of the Merchants Ice & Cold Storage Company owned by Pacific Empire Holdings, Inc.—that is to say, approximately 65,000 shares of common and 12,000 shares of preferred—were of higher value in 1942 than they were in 1941?

A. I had only a short time to look, to just scan these statements; I had no time to give an analysis, but on the figures that the statements show and based on the figures that I had in the statement that I submitted here they show very material improvement, and that improvement was about what we would have expected, under the analysis that I discussed.

Mr. Scampini: No further questions.

Recross Examination

Mr. Naus: Q. In 1940 the gross revenue, the gross business of Merchants Ice & Cold Storage Company was something under \$400,000; you recall that? A. Yes.

(Testimony of Will E. Morrish.)

Q. The profit in 1942, you observe, do you not, from looking at the statement was based on gross revenue or gross sales in [329] excess of \$800,000 for that year? A. Yes.

Q. At the end of 1940 did you look into and see that in 1942 the Merchants Ice & Cold Storage Company was going to do more than twice as much gross business as they had in previous years?

A. Based on the war situation it so looked, yes.

Q. You expected it would more than double?

A. We certainly expected it to double in the war situation. It is a very important service.

Q. Mr. Morrish, you and I and perhaps the Judge know enough to know what happened in the former war. There was a great deal of business, particularly in time of war. A. Yes.

Q. That is what you mean? A. Yes.

Q. Then do you ascribe the good business done for the calendar year 1942 to a condition of war, that transitory condition, primarily, if not entirely?

A. Well, not entirely. I think that anyone going in there with any executive ability could have improved very materially the condition of that company, and I judged that Mr. Bercut had ability along that line. However, the main part of the increase was due to war condition and not to business ability.

Q. Let us take a step further. Having in mind also that these rates down here are regulated by a public body and they are not to be up and down at

(Testimony of Will E. Morrish.)

will, without assistance of war business would you forecast that the Merchants Ice & Cold Storage Company would go back to the doldrums?

A. Well, I would forecast in my judgment there would be a period of several years of good times, at which time the bond issue of the company could be paid in full, and that the company would then be able to weather any condition that might arise.

Q. Then you would expect as of January, 1941, that any possible [330] purchaser of the common and preferred stock of Merchants Ice & Cold Storage Company would pay a fair price, based on your personal view of what would happen in 1943, 1944 and 1945?

A. I think he would have made a fair purchase.

Further Redirect Examination

Mr. Scampini: Q. At what price would you think he would have made a fair purchase?

A. I would stay with my original price.

Q. What was that again?

A. My original statement was around \$2.80 a share, approximately.

Q. For the common? A. For the common.

Q. And \$10 a share for the preferred, is that right? A. Yes.

Q. In other words, you are now stating for the purpose of the record in your opinion anyone who paid the equivalent of \$2.80 a share for 65,000

(Testimony of Will E. Morrish.)

shares of common and \$10 a share for 12,000 shares of preferred from the Pacific Empire Holdings on January 8, 1941, would have paid a fair price?

A. Yes.

Further Recross Examination

Mr. Naus: Q. What is the common stock being bought and sold for today?

A. I have not that information.

Q. What is the highest the common has ever been bought and sold for at any time in the ten years ending today?

A. I cannot answer that, but I think that sales of stock on the market mean very little as to actual value.

Q. You mean that anyone in the last couple of years, any time during the last couple of years, who held any common and sold it for not more than 50 cents was simply guilty of business stupidity?

A. That is a rather strong statement.

Q. I would make it stronger if I could.

A. I would say that I would not have sold any stock that I owned for 50 cents [331] a share.

Mr. Naus: Well, that does not quite answer my question, but I will pass it.

Mr. Scampini: No further questions.

Mr. Pardini: Q. In other words, if you had one share of stock out of 106,000 outstanding and you did not have the control, you might sell it at 50 cents?

A. I might give it away then.

(Testimony of Will E. Morrish.)

Q. If you had control you would put a different value on it? A. That is right.

Mr. Pardini: If your Honor please, during the first day of trial this week in connection with reading the deposition of Miss Keener I was asked as to her relationship with Mr. Arnold. I sent him a telegram, "Who, when and where did you marry?" and received an answer, "Answering your wire, please know that since Mrs. Arnold's death February 15, 1941, I did not marry anyone any place. This is for your information in connection with pending litigation."

Mr. Naus: I ask that the telegrams be marked for identification.

The Court: They may be marked.

Mr. Brownstone: I think I might make a statement that I can produce a letter under the signature of the present wife in which she states that she is his wife.

(The telegrams were marked "Defendants' Exhibit H for Identification.")